

AMERICAN BAR ASSOCIATION JOURNAL

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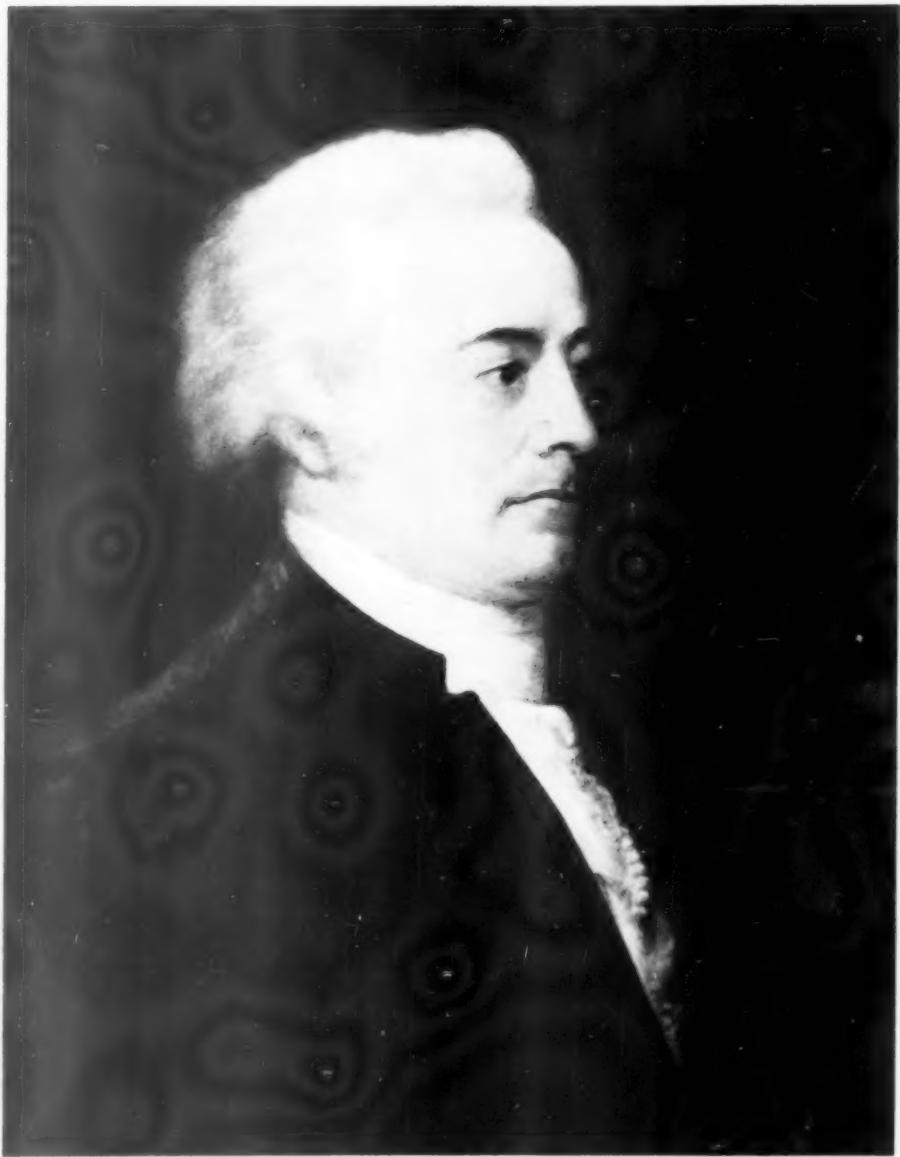
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When Tax-Hungry States Spot Taxable Corporations

... then the corporation's lawyer has his work cut out for him. Which of the multiplicity of different taxes in different states are for his client to pay—and when?... which of the multiplicity of different reports (designed by different states to bring taxables clearly to light) are to be filed by HIS client, and where?... occupation license tax in one state, income tax in another, use tax here, corporate excess there... sales taxes, intangible property taxes and "business" taxes... annual capital stock return... annual "foreign bonus report"... Report of Change in Stated Capital and Surplus... annual report of dividends paid to residents, registry statement... Annual Certificate of Condition... like the soldier's dream of boots, boots, boots in Kipling's poem...

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In This Issue

Our Cover—John Rutledge of South Carolina was nominated by President Washington as Chief Justice of the United States in 1795, and served in that office for some months. It was an interim appointment made while the Senate was not in session, and while the President had power, alone, to make a temporary appointment. When the Senate convened, Rutledge failed of confirmation. President Washington thereupon nominated Oliver Ellsworth of Connecticut, whose appointment was confirmed.

Rutledge was a member of the Continental Congress and of the Provisional Congress which preceded it; was a member of the Convention that adopted the Federal Constitution; was Associate Justice of the Supreme Court of the United States (1789-91), resigning to become Chief Justice of South Carolina (1791-95).

In 1 U. S. 127, 3 Dallas 121 there appears the following court minute:

"August Term, 1795"

"A commission, bearing date the 1st day of July 1795, was read, by which during the recess of Congress, John Rutledge Esq., was appointed Chief Justice, till the end of the next session of the Senate."

At that Term he rendered the opinion in *Talbot v Janson*, 1 U. S. 128, 3 Dallas 33.

John Rutledge, therefore, is entitled to a place on the cover of the JOURNAL in our series of Chief Justices. The photograph used is a reproduction of the painting by Trumbull.

Bankruptcy Act of 1938—Viewed from the administrative side of Bankruptcy proceedings, there are "two schools of thought" which have been urged upon Congress from time to time. One is that the court in which the estate is pending should dominate in determining matters of business administration and management. That theory may fairly be said to have been adopted in the recent act. The other theory is that in such matters the largest measure of control that is at the same time possible and practical should be left with the creditors since they really own the estate. The pendulum has fluctuated from time to time from one of these theories to the other. These two opposing views are well set forth and contrasted in the two articles about the Chandler Act in this issue.

Unfair Trade Practices—The question of price control and of "unfair" trade agreements on the part of producers and distributors of merchandise is one of the live questions in modern American law. The boundaries of legislative and court control in this field of the law are being expanded and at the same time more definitely etched out by statutes and decisions. California has probably given more consideration to this field of the law than most of the other states. For this reason the article in this issue on the California Unfair Practices Act will be read with interest by lawyers and legislators everywhere.

Mid-Winter Meeting—As an active member of the American Bar Association suggests in his letter in this issue about regional conferences: One of the main problems of the Association is to bring the Association and its manifold activities and interests home to the great majority of members who cannot expect to attend its meetings. One of the reasons for the founding of the JOURNAL was to help meet that problem. We at headquarters are sometimes too close to the forest to see the trees; but we do strive to retain an objective point of view so far as we can. It is the purpose of the JOURNAL in reporting, in this issue, the proceedings of the Mid-Winter Meeting of the House of Delegates to give our members a comprehensive and interesting and objective "story" of the Mid-Winter Meeting.

The "Administrative Law Symposium" in the March issue attracted considerable interest, and we have many inquiries for reprints of it. The account of the discussion on Administrative Law by the House of Delegates at the Mid-Winter Meeting has been featured in the April issue. It has inherent and substantial interest for all lawyers, particularly because of the bills on Administrative Law now pending in Congress. As we indicate at another place, the JOURNAL is prepared to furnish a joint reprint which will include all the items about Administrative Law in the March issue and likewise all the discussion on that topic before the House of Delegates reported in the April issue. The 150,000 lawyers in the United States have a large stake

in the legislation pending before Congress on Administrative Law and all of them will want to be fully informed on issues involved.

Original Articles—The article "The Tenth Amendment Retires," in this issue, is a timely discussion of that engaging topic, the Domain of the Powers of the Federal Government. Professor Feller, of Yale Law School, is a recognized authority on "Federal Jurisdiction," and he writes with an engaging style.—"The Utility of Foreign Law" by Professor Wolff of Columbia University Law School shows the value of wide legal scholarship to the practicing lawyer.

The Editor-in-Chief Reports—The comment by the Editor-in-Chief on the present condition of the JOURNAL, chiefly on its business side, given at the Mid-Year Meeting of the House of Delegates in Chicago, is printed elsewhere in this issue. Some comment is also there given on the editorial side of the JOURNAL's activities. In this connection it is interesting to read what was said in an editorial in the JOURNAL published in February, 1921, the first issue of the JOURNAL to carry Major Tolman's name at the masthead:

Contributions

"The Board of Editors wish the members of the Association to feel that the JOURNAL is a forum in which every question of broad interest to the profession in general may be discussed. Articles and letters are welcomed and those who send them may be assured that they will receive prompt and careful attention."

"It is principally through contributions from members that the JOURNAL hopes to make itself the effective voice of the best thought and feeling of the profession in the United States. There can be no substitute for such co-operation in the case of a publication which aims to express, not simply the views of a particular group, but those of the best elements of the profession as a whole."

We are glad to say that the JOURNAL consistently receives from contributors its fair share of original articles.

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The American Bar Association is paying its way—our budget is balanced as to all normal activities—but income from dues is insufficient to carry these vital emergency measures. A resolution of the Board of Governors waiving payment of dues of members entering military services is, moreover, resulting in a decrease in the Association's normal revenue.

The Committee on Ways and Means, supported by the Budget Committee and the Board of Governors, appeals to the members of the Association for sustaining memberships of \$25.00 each, as a means of permitting the organized legal profession of the United States to perform its part in the present crisis. The emergency is here—NOW.

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[See page 215, this issue.]

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AMERICAN BAR ASSOCIATION JOURNAL

APRIL
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CURRENT EVENTS

Bar Integration in Massachusetts

THE JOURNAL is recently in receipt of a leaflet issued by the Massachusetts Bar Association and the Law Society of Massachusetts, copies of which have been sent to all members of the Bar in that state, asking for a questionnaire vote on how lawyers in Massachusetts stand with regard to Bar Integration. The leaflet presents a clear factual statement about "What an Integrated Bar Is," "What an Integrated Bar Is Not," "Manner of Integration," "Reasons for Integration," "Objections to Integration," and "How Massachusetts Stands on Bar Integration." Under the last topic there is quoted a resolution of the Massachusetts Judicial Council in 1937 and repeated in 1940 in which it is stated:

The Supreme Judicial Court is hereby requested to provide by rules, for the organization of all present and future members of the bar of this Commonwealth, as a self-governing body subject to the constitutional authority and rules of said court, to be known as the Bar of Massachusetts. There is also given a table showing that 26 states have adopted integration, beginning with North Dakota in 1921 and concluding with Louisiana in 1940.

The following definitions in regard to an Integrated Bar will be read with interest:

1. *What an Integrated Bar Is.*—

A state or integrated bar is a self-governing association composed of all practicing lawyers in the state. Membership requires the payment of an annual fee, usually not more than \$5.00, and is automatic for those engaged in active practice. A lawyer may not practice unless he pays his dues. An integrated bar does not differ greatly from a bar association, save only in the important feature that membership is automatic and all-inclusive. It applies to lawyers already admitted and to those later admitted.

2. *What An Integrated Bar Is Not.*

It is not regimentation, for the

integrated bar governs itself. It in no wise affects existing standards of ethics nor established practice and procedure. It is a method of making lawyers as a body more useful to themselves, to the public and to the courts.

Denver Bar Celebrates Golden Anniversary

THE fiftieth anniversary of the Denver Bar Association was commemorated by a banquet and dance on February 27. Four hundred lawyers and their wives were present when President Ben E. Sweet brought the gathering to order. Judge Orie L. Phillips, Justice of the Circuit Court of Appeals for the Tenth Circuit, acted as toastmaster. He introduced Burt J. Thompson of Forest City, Iowa, Chairman of the ABA Section on Bar Organization Activities, who spoke briefly on that topic. Jacob M. Lashly, President of the American Bar Association, was then presented and he spoke on the need of local and state bar associations using their influence to secure adequate consideration of the bills now pending in Congress relating to administrative procedure in governmental agencies.

The main speaker of the evening was Judge John J. Parker, of the Circuit Court of Appeals for the Fourth Circuit, who called attention to the grave perils which threaten the United States in the present world struggle. He suggested that lawyers everywhere organize themselves to combat subversive influences and to educate all persons living in the Americas to appreciate the democratic way of life. He pointed out that no sacrifice was too great if we could indeed make the Wilsonian idea of a world safe for democracy come true.

Lawyers from Wyoming, New Mexico and Utah, attending the regional conference of bar executives were guests of the Denver Bar Association at the banquet.

Law Reviews in America

AS we go to press the "Fiftieth Anniversary Issue" of THE YALE LAW JOURNAL comes to hand. It contains a "foreword" by Chief Justice Charles E. Hughes, written in a happy vein, in which he says, among other things:

It is not too much to say that, in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical.

Then comes a sentence which the Chief Justice must have written with a twinkle in his eye:

And I think we may assume that a bench composed of law school professors or law review editors, impartially chosen, would exhibit views as varying as those of the judges whose works they appraise.

That sentence might well be called "the retort courteous", and indeed the "quip modest"—which according to Shakespeare is the next strongest reply.

The Anniversary number also contains as a special item, an interesting commentary on Law Reviews [particularly Yale's] by Professor Arthur L. Corbin, of that school, called "The First Half Century." What Professor Corbin says of his Journal through the years is true of every Law Journal in the land:

The pages of the *Journal* have shown and must continue to show the changes in the climate of opinion in our great country. There we find evidence of [a] continually developing consciousness of the evolution of government and of law, constitutional, statutory and unwritten. . . . The changing ethical and social mores, the emerging and the dying theories of economics and politics, are appealed to, sometimes naively and sometimes dogmatically, in the process of temperate and intemperate criticism of court decision, of administrative action, and of the work of juristic writers. . . . And above all,

in the last ten volumes, we see the effects of economic and political conflict—the struggle for survival and power between state and nation, between the written constitutional word and the radical innovation impatient of the rule of the dead hand, between organized labor and incorporated capital.

That resume of the last ten years is a good forecast (it is submitted) of what Law Journals will continue to "show" for some time to come.

We conclude by saying Hail to Yale Law Journal on its 50th anniversary.

"The Hour of Opportunity"

The following item appears as a display editorial on the front page of American Law and Lawyers, March 15, 1941. That journal, which describes itself as "The Profession's National Weekly Newspaper," is published at Cincinnati.

"**A**s if guided by the hand of Providence, the American Bar Association has brought into being, just at the time when it was most needed, an agency capable of synthesizing the knowledge, experience and foresight of the entire Bar and of placing the collective professional influence at the service of the nation.

That agency is the House of Delegates.

Of course, as is frequently noted, lawyers have always exerted a tremendous influence in American life, and it is their hands that have shaped in no small measure our political, social and economic institutions. But individual lawyers—not the Bar as an organization—did this. Until the House of Delegates was established there was no national integration of the profession, no device for bringing lawyers' opinions to a focus, no group that could truly represent itself as speaking for the whole Bar.

Now we have such an agency, and we find that the nation is critically in need of its services. Emergency succeeds emergency. Change follows change faster than their meaning can be comprehended or their worth appraised. Only with great difficulty can the shape of things to come be discerned. As perhaps never before in its history the country needs the calm, reasoned judgment of lawyers, not as a reactionary influence, not as ballast, but as a guide to the new country of the future along paths that the past has shown to be safe.

Will the House of Delegates meet the need?

We believe it will, provided always that the job of selecting delegates is re-

garded back in the grass roots as a serious piece of business.

In selecting delegates there must be an end to the time-honored practice of "passing the honor around" among men who want the honor but no work and whose chief concern, as some wag has pointed out, is to get through the year without any controversy and wind up with a "dandy annual dinner." That type of lawyer has no place in the House of Delegates. Nor has the lawyer any place there who continues to be an advocate or lobbyist when he is supposed to be considering the broader interests of profession and public.

If delegates are chosen, however, as men who can and will express the views of those they represent, as men who are sincere in their Bar organization work and who believe in the ideals of the profession, and as men who are honest, open minded and patriotic, there need be little fear that the House will fail to meet the challenge in this, its hour of opportunity.

Patent Attorney Advertising

[From *New Jersey Law Journal*]

EFFORTS to obtain Congressional approval of legislation to call a halt to patent attorney advertising have been renewed by the American Bar Association's Patent Law Section.

Jennings Bailey, Jr., chairman of the section's legislative committee, expressed hope that the measure could be put on the statute books this year. Introduced by Congressman William H. Stevenson, Wisconsin, the bill has been brought to the attention of the House patents committee in time for enactment this session if the lawmakers see fit to put it through.

Virginia Considers Rules for Procedure

[*Virginia Bar Weekly*, Feb. 25, 1941]

A PROPOSED bill which would vest the rule-making powers in civil court actions in Virginia in the hands of the Supreme Court of Appeals has been drawn up at a conference of special committees from the Virginia State Bar, the Virginia State Bar Association and the American Bar Association. Under present law, the General Assembly provides rules of procedure in civil actions. The bill agreed upon by the three committees must be approved by the parent bodies before it is introduced in the next session of the General Assembly.

Bar of England

THE JOURNAL has recently received the *Annual Statement* of the *General Council of the Bar of England*, and some of the items therein will be read with interest by American lawyers. The last annual general meeting was held in the Inner Temple Hall, January 18 and the Attorney-General of England (Rt. Hon. Sir Donald Somervell, K.C., M.P.), presided. The Chairman of the General Council is Sir Herbert Cunliffe, K.C.

[A full page photographic reproduction of his letter to the Editor of the *ABA JOURNAL*, responding for the English Bar to our "Salute to the Bar of England" which appeared at page 773 of our October issue, is given at page 70 of the February issue.]

The governing body of the Council consists in part of twenty-four lawyers, twelve of whom are from the list of "King's Council" and twelve from the "Outer Bar" the names of the individual members of the Council being given.

The financial statement for the year 1939-40, which is given, is of interest. The receipts total 2,305 pounds, 8 shillings, and were contributed entirely by what is called "contributions" from the four Inns of Court; Lincoln's Inn, Inner Temple, Middle Temple and Gray's Inn. [The financial statement is interesting to American lawyers in so far as the "contributions" from the Inns of Court are concerned. Here is what might be called the "Bar Association of England," apparently financed by the Inns of Court, and without general dues from members of the bar, as with us.—Ed.]

Refugee Children of English Lawyers

THE following item is quoted from the *ANNUAL STATEMENT* of the *GENERAL COUNCIL OF THE BAR OF ENGLAND*. [See above]

"In June, Mr. D. L. McCarthy, K.C., the Treasurer of the Law Society of Upper Canada (who is also President of the Canadian Bar Association), cabled to the Council offering the services of the Society in placing children of English and Scottish judges and barristers in suitable homes in Ontario. Publicity was at once given to this offer. Similar offers were received from a number of private individuals in Canada and the U. S. A. The Council, on behalf of the Bar, desires to place on record its warm appreciation of the kindness and generosity of these offers."

[Mr. McCarthy will be remembered as the able and friendly representative of the Canadian Bar at the Philadelphia meeting last September.—Ed.]

Judicial Opinions

February 26, 1941.

Editor, American Bar Association Journal, Chicago, Illinois.

Dear Sir:

MAY I express my pleasure in reading Chief Justice Simmons' article, "Better Opinions—How," in the February JOURNAL? He has set forth realistically why the increasing torrent of law books cannot be stopped by merely telling the judges to write fewer and better opinions. The formulation of an opinion is a necessary step in careful judicial work, and no one interested in a particular case wants that process foregone for him. It insures thorough consideration of all problems and is important in bringing conviction to the writer himself, as well as his associates and all the others interested as litigants, attorneys, appellate judges, also the judges of last resort, the law review and text commentators. Better opinions are desirable just as are better judges; but if mythical perfection could be approached, there would be little reduction in the bulk of opinion writing. For whatever is saved by terseness and economy of expression is lost by greater completeness of the argument. Careful opinion writing as a step in adjudication should be encouraged rather than questioned.

This does not mean that everything written needs to be published. Possibly something can be done here. Perhaps every opinion should be destroyed after the particular case has gone to final judgment; or perhaps only one microfilm copy should be kept under lock and key in the state library. But, here, too, the problem does not permit of easy and simple solution—too many opposing interests are involved. After all, judicial work is public business and there is a danger in keeping it secret and away from general scrutiny and criticism. Again large property interests have developed. Whether we like it or not, law publishing is a legitimate competitive business. There is waste, it is true, in the duplication of reports, as well as in the great bulk of accumulating aids, such as digests, annotators, and the like, not to speak of the voluminous headnotes, now swelling to form towards one-third the bulk of the law reports. But the lawyers themselves make at least part of the demand. Witness the many publications on the new federal rules of civil procedure, and the reports of cases applying them, though these decisions in the main only affirm the wide discretion committed to the trial courts. And yet lawyers have proposed, as at the last Second Circuit Judicial Conference, that appeals from interlocutory procedural rulings be allowed so

that more authoritative decisions will be available. In spite of their resolutions and protests, I question whether the lawyers, themselves would allow bygone opinions to remain buried in the court house.

Very truly yours,

CHARLES E. CLARK,

Judge, U. S. Circuit Court of Appeals, New Haven, Conn.

A Great Doctor Passes

We clip the following item from *Bench and Bar (Canada)* for March, 1941. Sir Frederick Banting will be remembered as the principal discoverer of Insulin. It will also be remembered that he gave his discovery and invention free gratis to humanity, and thereby waived aside a princely fortune. He was not a lawyer, but his sense of professional loyalty was something which all lawyers will respect and admire. His life and death has lent luster to all the professions.

"ONLY a person with a dead soul could have heard of the death of Sir Frederick Banting without emotion. Not only was his passing a great loss to his profession and to those whom he served but the circumstances were tragic in the extreme. His last acts were characteristic: mortally injured, he still strove to give aid to a fellow-victim.

Before such an event, at a time like this, when a man of his great skill and knowledge who could do so much for humanity is taken from among us so suddenly, we can only stand in silence. We cannot explain the facts; we can only believe that somehow, somewhere, there is an explanation which a Reason greater than ours can give and knows to be right.

To the members of our sister profession who have been deprived of so distinguished a fellow-worker, we offer our sincerest sympathy. We know that they will carry on the work he has begun and that through their efforts his contributions to medical knowledge will be perfected and bring relief and health to sufferers throughout the world."

Bar Applicants Given Deferred Classification

PROFESSOR HAROLD SHEPHERD, President, Association of American Law Schools, reports that State Directors of the Selective Service Act have been advised to allow further deferment for a relatively short period after July 1, 1941 to those who are in training or in preparation for Bar Examinations.

Cincinnati Conference

THE Cincinnati Bar Association on Saturday, March 1, under the auspices of the Ohio State Bar Association, conducted its seventh annual Cincinnati Conference, which was devoted to the subject of "Law and Lawyers in the Modern World." Previous conferences arranged by this Association have considered the subjects of "The Selection and Tenure of Judges," "Criminal Law Administration," "Trial by Jury," "Administrative Procedure," "The New Federal Rules," and "Status of the Rules of State Decisions."

Program

The problems considered were:

1. Legal Education
2. What, if Any, Changes with Reference to Admissions to the Bar Are Needed?
3. The Economic Status of Lawyers
4. Legal Services for the Low Income Group
5. Governmental Participation in Business
6. Qualification for Practice Before Boards and Commissions
7. Should the Merit System Be Used in Making Appointments of Lawyers for Public Service?
8. Could Trials Be Avoided and Expedited by the Following Devices?
9. Survey of the Conference Problems

Purpose

The leaflet announcing the Conference said among other things:

Let us try to interpret the situation of lawyers. We are in a whirl of local and world-wide changes that vary our work and enlarge our responsibility. Many new boards and commissions have been established; rules for the orderly admission of evidence are being let down; government has entered business; old constitutional restraints are being put aside; old governments are giving way; laymen and lay agencies are doing work in the lawyer's field. A mental attitude has developed that is impatient with delay and grudging of costs.

How does all this affect the opportunities of lawyers, the requisites for law practice, and the responsibility of lawyers to society?

One thing is clear. It is our job to maintain and operate inexpensive, and expeditious machinery for the administration of justice.

ALFRED BETTMAN,
Chairman of Committee in
Charge of Conference.

"The Medical Point of View"

THE following item is abstracted from an article bearing the above title by Dr. Cyrus C. Sturgis, Professor of Medicine, University of Michigan. It appeared in the JOURNAL OF THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, for March, 1941. It deals with a phase of medical education and medical practice which is closely related to similar problems in the legal profession.

"When I present a clinic to the fourth year class and look out on the faces of my assembled students, who, within a few months, are to be entrusted with the responsibility of the care of the sick and the dying, I am not particularly concerned with their knowledge of chemistry, physics or biology or any other science. What concerns me is whether they know anything about life in general. Can they think? Do they have judgment? Will they assume responsibility? Do they have an understanding or even a faint inkling of what life is all about? What are their ideas of ethical conduct in general?

Most physicians of my generation have been educated in what could be called the era of science in the practice of medicine. Extraordinary progress has been made and countless future generations will be greatly indebted to the knowledge of diseases which has been developed during this period, for, undoubtedly, the science of medicine has progressed more during the past fifty years than it has in the entire history of the world. Furthermore, it now has an impetus which will carry it on forever. But with all of this scientific development, what has become of that almost equally important aspect of the care of the sick—the art of medicine?

These remarks have led up to the following belief, namely, that a pre-medical education should be designed to provide a background, not only for the science of medicine, but also for the art, and in addition, it should fit a physician for a wholesome, satisfying and useful life. For this, he needs not only the science but also a certain amount of philosophy, an understanding of human nature, and, probably most important of all, a general cultural background. These, in my opinion, should be the objectives of a premedical education, rather than an undue emphasis on science alone.

I have another criticism of the students when they reach the clinical years which I suspect is an old one from teachers of medicine. That is

the tendency of students to place undue emphasis on the amount of information which is acquired by memory rather than the desirability of training the mind to think intelligently about medical subjects. This is a defect which has been apparent throughout our educational system and sincere attempts are now in force to correct this, from the primary grades on through to the professional schools.

There is still too much of the desire on the part of students to memorize instead of understand facts. I would not have much admiration for a person who might memorize the Constitution of the United States, as it is not an impossible intellectual feat. On the other hand, I have the greatest respect for a constitutional lawyer who understands, interprets and applies the principles of constitutional law. And, probably, he would be unable to recite verbatim more than one-hundredth of that entire historic document."

Regional Conference at Denver

NEARLY a hundred bar association executives from Colorado, Wyoming, New Mexico and Utah met for a regional conference February 27 at Denver. The purpose of the conference was to encourage local bar associations to undertake new fields of activities and to call attention to the program of the American Bar Association for national defense. The program was planned by Burt J. Thompson of Forest City, Iowa, Chairman of the Section on Bar Organization Activities of the American Bar Association. Bar associations were urged by Judge John J. Parker, Chairman of the ABA Committee on Improving the Administration of Justice, to embark on a five-point program for improvement of judicial administration. He summarized this program as (1) Increased efficiency and elasticity in judicial organization, (2) Improvement in the administration of the jury system, (3) Improvement in procedure and evidence, (4) Improvement in practice of administrative agencies and (5) Improvement in appellate practice.

Except for short talks by Jacob M. Lashly, President of the American Bar Association, and Frazer Arnold, member of the Committee on National Defense, the entire conference was devoted to a discussion of ways and means to improve state and local bar associations. G. Dexter Blount, of the Denver bar, member of the Board of Governors of the ABA, presented the report of the Association's Committee on Unauthorized Practice.

The New Constitution of Panama

By Henry P. Crawford,
of the Department of Commerce

Because of the wide influence of the Constitution of the United States in Central and South America and particularly in Panama, the following article will be read with interest by the Bar of the entire country.

THE new Constitution of Panama, published November 22, 1940, after its approval on that date by the National Assembly, declares Panama to be an independent State with a republican form of government (Art. 1). The public authority functions through the medium of the legislative, executive and judicial branches of the government.

Foreigners enjoy in Panama the same civil rights and guarantees as nationals except for such limitations as may be established in the present Constitution or by law. However, no natural or juridical foreign person, nor any national juridical person whose capital is foreign in whole or in part, may acquire title to national lands situated within thirty kilometers of land frontiers nor the title to islands coming within the jurisdiction of Panama. Of course political rights may be exercised only by nationals (Art. 21). The capacity, recognition, and, in general, the control of foreign juridical persons will be determined according to the laws of Panama with respect to acts performed within the jurisdiction of the Republic (Art. 22). The entry of foreigners will be regulated by law under this Constitution and public treaties.

The right of private property ("acquired rights") is guaranteed and may not be disturbed by subsequent legislation. However, "private interest must give way before public social interest," and "for reasons of public utility or of social interest" expropriation may take place after judicial decree and "just previous indemnity" (Arts. 47, 48).

Labor is a social obligation and shall be under the special protection of the State. The latter may intervene for the purpose of regulating the relations between capital and labor, thus leading to greater social justice, assuring to the worker "a minimum of conditions necessary for life," and to capital a fair return upon its investment (Art. 53). The right to strike is guaranteed except as to public services and those strikes which have solidarity as their only ground (Art. 54).

The Supreme Court of Panama will be composed of five principal magistrates and five alternates, one of each being appointed every two years for a period of ten years.

ADMINISTRATIVE LAW SYMPOSIUM, II*

Discussion before House of Delegates Meeting at Chicago, March 18

[For Narrative Account of House of Delegates proceedings, dealing with other matters, see, post, page 211 et seq.]

BY a special order the report of the Committee on Administrative Law was taken up and discussed at length, at the mid-year meeting of the House of Delegates. Col. O. R. Maguire of the Washington, D. C., bar, is Chairman of that Committee.

Mr. Carl B. Rix, of Wisconsin, asked for unanimous consent that Dean Lloyd K. Garrison of the Law School of the University of Wisconsin, a member of the Attorney General's Committee on Administrative Procedure, be allowed to participate in the discussion and debate on this subject. There was no objection and it was so ordered.

Chairman Thomas B. Gay first called for the recommendations of the Board of Governors with regard to the report of the Committee on Administrative Law. That report had been printed in the Calendar of the House, as was also the "Statement of Principles," five in number, presented by that Committee. Secretary Knight announced that the Board of Governors concurred in the Statement of Principles, with certain modifications. The Statement of Principles, as modified by the Board of Governors, and as later approved by the House of Delegates is as follows:

Statement of Principles

"In view of the fact that a number of administrative procedure bills are now pending in both Houses of Congress and others may be introduced therein, we think that the organized legal profession, as represented by the House of Delegates, should agree upon and endorse a statement of principles which should be reflected in any administrative procedure bill to become law. We submit such a suggested statement of principles to be observed, in the absence of complete separation of prosecuting and deciding functions, in any legislation for the improvement of the administrative process:

(1) *Completeness.* A short but complete statement of the fundamentals of the whole administrative process, including clear declarations of policy;

(2) *Rules and regulations.* In con-

nection with administrative regulations: (a) the specification of required types of administrative rules; (b) a statutory enumeration of methods of rule making to be adapted to different kinds of rules and situations and designed to secure the participation of all interested parties in the rule making process, including formal notice and public hearing if requested and practicable preliminary to the issuance of interpretative or substantive law rules; (c) a recognition of a right of petition in connection with the making and modification of rules, and (d) clear provision for judicial review both upon recognized principles of declaratory judgment or in cases of actual controversy.

(3) *The adjudicatory system.* In connection with administrative adjudication: (a) The segregation of prosecuting and judicial functions in the administrative process; (b) a requirement that adjudications be expedited in order to secure the prompt relief of private parties; (c) a definition of the duties of officers who may preside at administrative hearings; (d) declared standards of fair and impartial procedure; (d2) provision for the independent selection of administrative hearing officers, other than the heads of agencies, designed to secure their independence of judgment; (e) a statement of the applicability of the basic principles of evidence, together with a recognition of the right of cross examination; (f) provision that decisions shall be made by the administrative officers who heard the case in the first instance (subject to review by superior administrative officers), and that all deciding officers shall confine their consideration to the record, shall personally master the pertinent parts of the record, and shall not rely upon outside aid (other than clerical) in the performance of this function; and, (g) adequate requirement of the making of findings and conclusions, and the statement of reasons for decisions.

The foregoing standards should be placed within a legislative framework

which requires (a) adequate and specific notice in all cases, the simplification of responsive pleadings, and the availability of declaratory rulings in all cases of threatened action or controversy; (b) a statement of unmistakable authority for the informal disposition of uncontested cases, coupled with a requirement of formal procedures in all cases where private parties demand them; (c) the limitation of sanctions or penalties to those authorized by law; and (d) a clear statement of the procedure for judicial review and an adequate scope thereof, together with provisions which will simplify and decrease the cost of such review.

(4) *General provisions.* In connection with all administrative proceedings: (a) Provision for the proper delegation and decentralization of authority; a definitely stated right of appearance and representation of parties; and the simplification of the admission of attorneys or others to practice before administrative agencies; and (b) appropriate limitations upon investigatory powers, the issuance of subpoenas, and administrative publicity.

(5) *Exceptions.* The exception of purely executive functions which do not lend themselves to formal procedures, such as lending, spending, national defense and similar types of governmental activity."

Additional Resolutions

The Board of Governors also recommended two further resolutions which were likewise later approved by the House of Delegates:

"RESOLVED, That the House of Delegates expresses the opinion that Senate Bill 674 (which was drafted by the "minority" of the Attorney General's Committee) is the bill which up to this time best embodies the above Statement of Principles; and further

"RESOLVED, That the enactment into law of legislation embodying these principles is of great public importance and that the Association lend every effort in aid thereof."

*See prior Symposium March JOURNAL, page 133, et seq.

Comment by Chairman Maguire

CHAIRMAN MAGUIRE moved the adoption of the Statement of Principles and the resolutions as submitted by the Board of Governors, and the motion having been seconded, he said, in substance:

The House will remember that in September, 1937, there was presented to the House, at Kansas City, proposals that later became the Logan-Walter Bill. The House then approved the proposals in principle. Dean Pound became chairman of the committee in 1937 and in 1938 there was submitted to the Board of Governors in Washington, in May, a draft of the bill which the Board of Governors approved. The matter came up at the annual meeting at Cleveland in 1938 and was referred back for action by the Board of Governors to the House of Delegates. Those two bodies considered the bill at the Mid-Winter meeting in Chicago, in January, 1939. The bill was later introduced in the Senate and the House. The Judiciary Committees of the two houses both reported out the bill with unanimous action. The House later passed the bill by a two-to-one vote, after three days of debate. In the Senate it was impossible to get the bill up until late in November, 1940. On motion of Senator Hatch, who took the leadership after the death of Senator Logan, the bill was made unfinished business before the Senate. The next day the leader of the opponents of

the bill demanded an immediate vote. The bill was never debated in the Senate. It passed by a vote of 27 to 25. The bill as passed by both Houses went to the President, who vetoed it. The veto message [printed in the January JOURNAL] is considered by Dean Pound in an address before the New York State Bar Association and published in the March issue of the JOURNAL.

In December, 1938, Attorney General Cummings recommended a committee on administrative procedure. He resigned before action was taken and his successor appointed a committee, first of six persons, to which five more were added, making a total of eleven. The committee worked from the time it was established until January 22, 1941, when its report came down. The final report of the Attorney General's Committee on Administrative Procedure has been printed as Senate Document No. 8.

It will be noted that there is a "minority" report in the report. It is not entirely a minority report because the "minority" agreed in many respects with the majority. There is a special third statement by Chief Justice Groner. Anyone who will read the report can appreciate the tremendous job that has been done by the Attorney General's Committee; and the public service the Committee has rendered in making its study available to the legal profession and to business men and others interested

in having some reform in administrative procedure. I should be remiss in my duties and most ungrateful if I did not say that this monumental work, in my judgment, is far superior to the job of Lord Sankey's Commission in England.

The bill approved by the "minority" is not entirely satisfactory to the Committee on Administrative Law. But it does embody the principles for which the Association has been contending; namely, it presents a reasonable opportunity for hearing before the administrative boards, and it provides for judicial review in accordance with the Constitution and Statutes. Since the Board of Governors saw fit to recommend the "minority" bill, I as chairman, am quite willing to go along with that recommendation.

When we commenced in 1937, no one knew much about this subject of administrative law, except in the colleges. Today it is a common topic for editorials even in country newspapers. Newspaper and magazine writers and columnists are concerned with it. Our Bar is concerned with it.

Questions were asked of Chairman Maguire by Ernest S. Williams, of California, George Morris, of the District of Columbia, Frank W. Grinnell, of Massachusetts, and William O. Wilson, of Wyoming. The questions asked and the responses from Colonel Maguire further elucidated the subject.

Comment by Lloyd K. Garrison

M R. LLOYD K. GARRISON, of Wisconsin, was then heard. He said, in substance:

I am very grateful for the privilege of being allowed to say a word to this House of Delegates, of which I was a member during the first year of its existence. I appreciate very deeply what Colonel Maguire has stated about the work of the Attorney General's Committee, of which I was a member.

For my part, I should like to pay my tribute to the work of Colonel Maguire's Committee, without whose pioneering labors we should not be where we are today.

I am not here to debate the merits of the so-called majority report and so-called minority report. As a member of the so-called majority group, I would prefer that the resolution before the House should endorse the

bill prepared by the majority of the Committee rather than the other way round. But I am not going to debate the differences. On the contrary, I should like to draw your attention to the extent of the agreement within the Committee. I think there is possibly some misunderstanding about that.

Actually, the report of the Attorney General's Committee was a unanimous report, so far as 190 pages of the printed report are concerned. It contains numerous recommendations, many of them quite sweeping, signed by all eleven members of the Committee. The additional views of Messrs. Vanderbilt, Stason and McFarland, and also of Chief Justice Groner, were in reality additional views and not dissenting reports. The differences between the members of the Committee were simply differences as to how far to go

along a road which we were all traveling together.

The printed report which is before you of Colonel Maguire's Committee (printed on pages 78 to 93 of the Calendar of the House of Delegates), suggests at one place that the differences in the Attorney General's Committee were between those who would increase the executive prerogatives as represented by the majority, and those who would restore, to some extent, the balance between the three coordinate branches of our constitutional system of government. I think that statement unintentionally creates a wrong impression. All eleven members of the Committee moved toward the reduction of the autonomy of administrative agencies; toward limiting the freedom and autonomy of the administrative system. The only differences were how far those limitations should

go; the so-called minority wishing to go somewhat further in the extent of restrictions and limitations than the majority; but all traveling the same road together and differing only as to the precise stopping point.

Having said that, I should perhaps stop. However, since the Statement of Principles that has been read is silent on the subject, I wish to draw your attention to two major recommendations upon which all eleven members of the Attorney General's Committee were agreed:

First: The creation of a so-called "Office of Federal Administrative Procedure."

Second: Provisions looking toward increasing the independence, tenure, salary and quality of trial examiners, called "Hearing Commissioners" in the report.

Office of Federal Administrative Procedure—All of us on the Committee, who served for nearly two years, were struck by the fact that the mere process of asking questions of administrative agencies about how they did this and how they did that, and why they did this and why they did that,

and whether they knew that in agency A things were being done along lines that agency B had apparently never heard about—this mere process of questioning brought about a toning up and an internal reform of procedure within the agencies as we went along. It therefore seemed perfectly apparent that a permanent standing body, [the Office of Federal Administrative Procedure] performing that function, could do a very useful job.

Hearing Commissioners—As to the matter of trial examiners, or Hearing Commissioners, the Office of Federal Administrative Procedure would have the important duty of appointing such Commissioners, who were to have their salaries increased and were to have a fixed tenure. It was hoped thereby to create positions so important as to attract men of first rate calibre and standing. These would be the individuals who would hear the facts, before whom the witnesses would appear and whose initial judgment is so important. These would be the key positions in the whole administrative process. The differences between the majority and minority of the Attorney General's

Committee with respect to Hearing Commissioners were again only matters of degree. The members of the Committee were all going along the same road, down the same road together.

In conclusion, Dean Garrison said:

"I believe that we are on the threshold of a great reform in our jurisprudence. Again I pay tribute to the pioneering work of the Committee on Administrative Law of the American Bar Association, without which this reform would not now be so imminent. I hope in the months to come, when the discussions before Congress turn upon these matters of degree, we shall approach the matter objectively and dispassionately, and, so far as we can do so, submerge non-essential differences. Most of the differences between the two reports and the two bills prepared by the Attorney General's Committee are non-essential differences. Let us pull together, so far as we can, and put our shoulders to the wheel, and thereby bring about what I am confident will turn out to be a great jurisprudential reform."

Comment by Arthur T. Vanderbilt

M R. ERNEST S. WILLIAMS, of California, then moved that the recommendations of the House of Delegates should state that every effort be made to secure a broader judicial review of findings of fact "than the mere substantial evidence rule." Thereupon, followed a discussion between Mr. Williams and Chairman Maguire. As a result of the discussion John H. Cantrell, of Oklahoma, asked that the House hear the views of former President Arthur T. Vanderbilt.

Mr. Vanderbilt, of New Jersey (a member of the Attorney General's Committee) began his comments with close attention of the House. He said:

I recognize the force of Mr. Williams' suggestion. If we were dealing with an ideal situation I should certainly like to see judicial review of all administrative tribunals as extensive as the review accorded at common law or to a Chancellor's decision in equity. There is no doubt that when a Judge sits without a Jury it is a very great restraining influence on his findings of fact to know that all of his findings are going to be subject to review by a tribunal made up of more than one Judge. But on this point as on several other points in the Report I think we have

to face the actualities of the situation.

What I am about to say may not be altogether pleasing to the Judges in the House, or who may hear of this outside the House. We are confronted very definitely, when it comes to a review of fact-findings of administrative bodies, by a fixed determination on the part of a Judiciary at Large, not to assume that responsibility. It was about 75 years ago that Lord Chancellor Campbell, while still on the King's Bench, asserted in an opinion that he was not elevated to Judicial position for the sole purpose of running a Railroad, and on that ground he declined to assume responsibility over administrative decisions of fact. A great deal of the difficulty that we find ourselves in, today, in the Federal system goes back to the early determinations of the Judges of our Supreme Court in *Haborn's case* to decline to give advice and counsel when requested by the Chief Executive, President Washington, with respect to pension matters. At that time, and still in many jurisdictions today, our County Judges and our Judges of Appellate Courts have administrative responsibilities which they perform as legis-

lative agents, responsibilities which are in no sense judicial. That is utterly and entirely out so far as a Federal Judiciary is concerned.

Faced with that very definite fact that Judges will not assume this responsibility, that there is a tendency to whittle it away whenever it is presented to them, the Committee was bound to adopt the best that they could possibly get; and in our opinion the best we could get would be to provide for review where the findings were contrary to the *substantial evidence upon the whole record*. By the phrase upon the whole record we were aiming to get away from the habit which has grown up within the last 5, 10 or 15 years of imposing on or importing into the word "substantial" a meaning which it did not formerly have. It originated, I suspect, in the briefs coming out of the Department of Justice. The lawyers there, in an effort to sustain a finding before some administrative body, go through the record and pick out items A, B, C, D and E; and they will say in their brief, "this constitutes substantial evidence"; ignoring, perhaps, an even greater or larger body of evidence of probative value that may go to the contrary.

There has been a tendency among

the Courts, particularly within the last year or two, to follow that lead. . . . That is unfortunate because it makes of the substantial evidence rule nothing more or less than a sort of *scintilla Jurist's rule*. So we have hoped to overcome that by saying substantial evidence upon the entire record.

Referring to Mr. Williams' reference to the most recent bill, the Hatch-Walter Bill, I think quite frankly we do not gain a thing by referring to "competent evidence," because if the provisions of the bill mentioned in the resolution now before this House are adopted, none but competent evidence can ever get before the tribunal or can be considered or reviewed; because that has been carefully taken care of in the provisions of the bill relating to evidence. So, after struggling from every direction and desiring to go as far as we could, having in mind what is possible also in Congress, we reached the conclusion that if we ask for reversal when the substantial evidence on the whole record was contrary to the finding below, we had gone quite as far as we could go and hope to succeed. I wish it were possible practically to attain the result and to use the language that Mr. Williams desires. I do not think in this day and year that it is possible, though that time may sometime come. So, frankly, we have based our findings and our phraseology on this particular thing, on the practical aspects of the situation. There is so much we can do to get a forward step that is possible to be made with the cooperation of men of all possible shades of political opinion that we cannot afford to wreck this enterprise by seeking to get an ideal which is not attainable at the present moment.

Mr. Williams thereupon stated that he accepted Mr. Vanderbilt's statement and agreed that it was an advantage over the mere substantial evidence rule.

Amendment Adopted

Thereupon, the amendment recommended by the Board of Governors as to the recommendation of the Committee on Administrative Law was unanimously adopted.

Judge Thacher

At this point Hon. Thomas D. Thacher, of New York, offered an amendment, the purpose of which was to require that:

In the administrative adjudication of any contested question of a quasi-judicial character in which the agency involved has an interest in

the determination of the question one way or another, the hearing shall be held before and decision rendered by a neutral person who is not an officer or employee of the agency, or under its control.

The motion having been seconded, Judge Thacher spoke in favor of his proposal. A discussion then ensued between Judge Thacher and Chairman Maguire as to the former's proposal, on which Mr. Vanderbilt also commented as follows:

Mr. Vanderbilt Concludes

I hope I may be forgiven for speaking again, but this is a very important point which Judge Thacher has raised. And I should like to explain the position of the "minority" with respect to it.

I think if we possibly could, everybody would like to see a system devised whereby there would be complete and absolute separation between the prosecuting and deciding functions. If you will notice the paragraph on page 209 of the "Minority Report" (of the printed report of the Attorney General's Committee), the "minority" concluded by saying:

"We think, however, that such dependence cannot be eliminated by measures short of complete segregation into independent agencies. The situation which we confront has two aspects which we should bear in mind:

The first is this: When Congress passes a law setting up a new scope of activity for an administrative agency, it generally does no more than lay down the very broadest of standards, leaving the work of integrating and developing the scope of activities of the agency to the practical development of time and to the men who are assigned to that agency.

The second is: During that experimental period when the agency is feeling its way forward to ascertain the exact bounds of the jurisdiction, and when it is proceeding to lay down the subordinate legislation in the form of rules and regulations, it cannot possibly in any satisfactory way determine just what those rules and regulations should be until it has the practical experience that it will get by trying and deciding case."

In other words, it seemed to us that there must inevitably be an experimental period in which the agency has an opportunity to decide just what the rules and regulations and subordinate legislation shall be to determine them in the light of actual complaints and actual trials. I do not see by what other process you could possibly go forward satisfac-

tory in the infancy of any one of these agencies.

I think that is one of the grounds which has led Congress to repeat this particular pattern and type of legislation so many times. Now the period certainly does arise with respect to every one of these agencies when they have found their way, when they know what their orbit is; so that we can come to a practical consideration of whether or not Congress should not be asked to separate completely the judicial from the prosecuting functions. That, it seems to me, is the purport of the section (already referred to) of the Minority Committee's Report on page 209. That is the question that Congress must decide, not in one blanket bill but as to every particular administrative agency separately, and on the status of the development of that particular agency. Until that shall have been done by Congress, until there is some such formative legislation providing for such separation as we have substantially now in the case of the Board of Tax Appeals, until that is done we would say that it is our job to recommend to Congress a most effective method of making your Hearing Commissioner independent.

We, the "minority," have gone a little bit further in this respect than the majority. We have provided that, when the nominations come in (for Hearing Commissioner) the Office of Administrative Procedure . . . shall pass upon the man's qualifications, his education, his temperament; and they are specifically given the power to make investigations with respect to those things. More than that, when his term is up, he (the Hearing Commissioner) is not re-nominated by the agency but he is re-nominated by the Office of Administrative Procedure. So that your Hearing Commissioner knows that his continuance in office and his reappointment depend not upon the agency to which he may be assigned, but rather on the determination of three impartial men (Office of Administrative Procedure) as to the value of his work during his full term in office.

As to the trials for removal, they can only be had by a hearing before these three men (Office of Administrative Procedure). So while during this period that Congress shall not have acted with respect to a particular agency, to set up complete segregation, we say that we have endeavored to provide the Hearing Commissioner with a degree of safety, with a degree of independence that is far greater than that enjoyed by

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any Judge who has to run for his office at a public election.

Taking all things into consideration, we think we have gone quite as far as we can go during this period in making him independent and impartial and free from the influence of the agencies. We have these two considerations that must be considered:

First, we have this trial period of infancy in the case of every agency.

Second, we have the period in which Congress shall not have acted to give us this separation. It is for that period that we have attempted to set up provisions in our bill.

I think, Mr. Chairman, that we have covered this in the resolution before this House, and I would be

very happy to let it go through if we have. I think that will save us from any future difficulty.

Amendment Lost

Judge Thacher then spoke briefly in rebuttal. A division was called and on a standing vote the proposed amendment was lost.

Resolution Approved

Thereupon a vote was called on the resolution recommended by the Committee on Administrative Law as amended by the Board of Governors. The motion for the adoption of the resolution so amended was unanimously adopted. The Report of the Committee on Administrative Law was itself not submitted for action.

Chairman Maguire, of the Committee on Administrative Law, concluded the discussion on Administrative Law with a short statement in which he indicated that those in favor of this legislation were confronted with the very practical problem of getting the bill embodying these principles enacted into law and that nobody should be sanguine enough to believe that there would be no opposition to such legislation. He pointed out the supporting groups that had helped in the work of supporting the Logan-Walter Bill. He urged the members of the House of Delegates on returning to their various States to secure the appointment of local committees who would carry on the work, and expressed the hope that all would cooperate to that end.

HOUSE OF DELEGATES HOLDS MID-YEAR MEETING

Narrative Account of Proceedings

THE Mid-Winter meeting of the House of Delegates was held in Chicago, March 17 and 18. The JOURNAL, as in the past, presents a factual summary of the entire proceedings of the House of Delegates, in narrative form and without editorial comment. We are inclined to say to our members, "Read it. It's worth reading."

First Session

The first session of the Ninth Meeting of the House of Delegates of the American Bar Association was called to order at the Edgewater Beach Hotel, in Chicago, Monday, March 17th, at 10:00 o'clock, by President Jacob M. Lashly.

President's Remarks

Roll call showed 140 members of the House present, at the opening session. President Lashly asked attention to the epoch-marking times in which lawyers are carrying on and to the fact that the public expects that lawyers will assert leadership in those fields where they are especially equipped to lead and where the public needs leadership.

"The Bar of America," he said, "will not shrink from its duties and will not fail in the high responsibilities which are laid upon it."

Speaking particularly to the members of the House of Delegates as chosen representatives of the Association, he expressed the conviction that "We shall proceed here seriously, as we always do, with tolerance, and reasonableness, and courage." The subsequent deliberations of the House demonstrated the full devotion of its members to those

principles which were so well expressed by President Lashly.

President Lashly thereupon turned the gavel over to Chairman Thomas B. Gay, of Virginia, who presided throughout the sessions of the meetings of the House.

Credentials and Admissions

The record of the Philadelphia meeting held in September, 1940, was approved. Next the report of the Committee on Credentials and Admissions was presented by its chairman, Morris B. Mitchell, of Minnesota. He informed the House that Allegheny County (Pa.) is now entitled to representation as provided by Article V, Section 6 of the Constitution having to do with representation of local Bar Associations in the House. He stated that such representation had been approved by his committee. He stated that the roster of members as called by Secretary Harry S. Knight represented the correct present membership of the House. His report was thereupon approved.

Treasurer's Report

Treasurer John H. Voorhees thereupon presented his report. He asked consideration of the auditor's report appearing in the 1940 Annual Report of the Association and pointed to the difficulty of presenting an interim report between annual meetings. Although the Association has been operating within its income, he expressed some doubt as to whether it would continue to do so, because of the fact that many members

have entered the armed forces of the United States and their dues have been suspended during that time, and the further fact that the expenses of the Association in carrying on its program for defense activities and other matters would be large. He referred the House to the Budget Committee and to Carl B. Rix, of Wisconsin, its chairman, for further information.

Board of Governors' Report

The report of the Board of Governors was next presented and was read by Secretary Harry S. Knight. The Board of Governors has held two meetings since the adjournment of the annual meeting at Philadelphia. The first was immediately after the adjournment of the annual meeting. The action of the Board of Governors at that meeting has been reported in the November issue of the JOURNAL. The second meeting at Chicago has been held in conjunction with the Mid-Winter Meeting of the House of Delegates. The report of the Board of Governors was approved.

Memorial to George R. Grant

Chairman Gay then recognized Frank Grinnell, of Massachusetts, who moved the adoption of a resolution in memory of the late George R. Grant, of Massachusetts, a delegate from that state and a member of the Board of Governors from the First Circuit. A memorial to Mr. Grant, together with a picture, appeared in the March JOURNAL. The resolution, proposed by Mr. Grinnell,

was adopted by a unanimous rising vote of the House.

Committee on Rules and Calendar

The report of the Committee on Rules and Calendar was then presented by its chairman, Chauncey E. Wheeler, of Rhode Island, who sought no action on his report at this mid-year meeting, but directed attention to several matters. He stated that amendments to the Constitution and By-Laws of the Association and to the rules of the House would undoubtedly be presented at the Indianapolis meeting. One amendment concerns the presentation of minority views of committees or sections.

The Committee recommended that Rule 7 of the Rules of Procedure of the House be amended as follows:

"(a) By adding to Section 2 of that Rule the following sentence: 'When a minority report has been filed in connection with a Committee or Section report, a representative of the minority shall have the privileges of the floor, without vote, to speak once, not to exceed ten minutes, upon the question.'

"(b) By amending the last sentence of Section 3 of said Rule so as to read as follows: 'No non-member of the House (except Chairmen of Association Committees or persons presenting minority reports of Committees or Sections) shall be heard by the House, unless upon motion of a member and the unanimous vote of the House.'

Another dealt with the subject of filling vacancies in the office of State Delegate and on the Board of Governors.

The Committee recommended an amendment to Sec. 5, Art. 5 of the Constitution which would be as follows:

"Notwithstanding the foregoing provisions, and in the event of any vacancy in the office of State Delegate occasioned otherwise than by the failure of the State Delegate to register on the opening day of the annual meetings aforesaid, until a successor shall be elected as aforesaid, the vacancies shall be filled by a person chosen by the President of the Association, the member of the Board of Governors from the judicial circuit in which the vacancy exists, and the remaining members of the House of Delegates from the state in which the vacancy exists, and in such manner as shall be determined by the Chairman of the House of Delegates. Said Chairman, immediately upon learning the existence of any such vacancy, shall be charged with the duty of carrying this provision into effect."

The Committee also recommended that the last sentence of Sec. 1 of Art.

6 of the Constitution should be amended to read as follows:

"If the office of an elective member of the Board of Governors shall become vacant, such office shall be filled for the unexpired term, by election, as herein provided, and until such election shall be held and a successor shall have been qualified, such vacancy shall be filled by a person chosen by the President of the Association and the members of the House of Delegates from the judicial circuit in which the vacancy exists, in such manner as shall be determined by the Chairman of the House of Delegates. Said Chairman, immediately upon learning of the existence of any such vacancy, shall be charged with the duty of carrying this provision into effect."

Another matter brought to the attention of the House involves the reports of Sections, particularly where legislation is proposed.

The Committee also recommended that Art. 12 of the By-laws entitled "Sections — General Regulations" be amended by adding a new section to read as follows:

"Section 6—All Sections shall have their reports printed, or otherwise duplicated, and distributed to members of the House of Delegates (unless otherwise ordered by the House) before action thereon is taken by the House of Delegates. Whenever legislation is proposed, reports containing recommendations for action by the House of Delegates, shall be accompanied by a draft of a bill embodying the views of the Section. All Section recommendations shall be accompanied by a statement of the reasons therefor. Recommendations of a Section or of the National Conference of Commissioners on Uniform State Laws may be acted upon at any meeting of the House of Delegates immediately following or held contemporaneously with a meeting of the Section or Conference."

[These proposed amendments will all be dealt with through advance notice published in the JOURNAL prior to the next annual meeting.]

A matter which Chairman Wheeler stated required no amendment but deserved consideration, was the election of Assembly Delegates. As to that, he proposed that those in charge of the calendar for the annual meeting should schedule the nomination of such delegates at one session of the Assembly and their election at a subsequent session.

The report of the Committee on Rules and Calendar was received and filed.

Resolutions

The next order of business was the offering of resolutions for reference to the Committee on Draft. Only one resolution was forthcoming, that from John M. Niehaus, of Illinois, Chairman of the Section on Commercial Law. Action on this resolution is reported later in these proceedings.

Committee on Professional Ethics

The report of the Committee on Professional Ethics and Grievances was presented by its chairman, Judge Orie L. Phillips, of Colorado. Judge Phillips moved that the report of his committee be called up for consideration jointly with the report of the Committee on Unauthorized Practice of the Law, and with certain recommendations of the Section on Patent, Trade-Mark and Copyright Law. The motion for such joint consideration was adopted.

Unauthorized Practice

Thereupon, Chairman Gay called on Edwin M. Otterbourg, of New York, Chairman of the Committee on Unauthorized Practice of the Law, to present his report.

The Report of the Committee together with four recommendations were printed at pages 20 to 22 of the Calendar of the House. The recommendations were as follows:

I. RESOLVED, That the Association recommend to the Commissioner of Patents that any non-member of the bar now on the list of attorneys registered for practice before the Patent Office, and any firm comprising a registered non-member of the bar, should be transferred to the register of "agents" when and if it appears that such non-member of the bar or such firm commercializes his privilege to practice as patent attorney improperly or, as a non-member of the bar, misleads the public to believe that he is an attorney at law and entitled to practice law generally, and that the Commissioner of Patents amplify the existing Rules of the Patent Office to effectuate the foregoing.

II. RESOLVED, That the Association further recommend that when a registered attorney, who is not a member of the bar, submits for approval advertising matter to the Commissioner of Patents, he shall be required to include in such material suitable language indicating to the public that while a "patent attorney," he is not an attorney or counsellor at law.

III. RESOLVED, That the Association further recommend to the Commissioner of Patents that whenever a court of competent jurisdiction of the federal government or of the several state governments shall find any non-member of the bar, who is registered

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as a patent attorney or agent, engaged in unauthorized practice of law, he shall thereafter be suspended or excluded from further practice before the Patent Office.

IV. RESOLVED, That the Standing Committee on Unauthorized Practice of the Law, in conjunction with the Section of Patent, Trade-Mark and Copyright Law, be authorized to offer their joint assistance to the Commissioner of Patents in the drafting of rules and regulations implementing the foregoing recommendations in accordance with the suggestions contained in their reports.

Chairman Otterbourg informed the House that the matters under consideration and the recommendations of his Committee involved practice before the United States Patent Office; and that his Committee and the Committee on Professional Ethics and Grievances and the Patent Law Section were all in agreement upon the recommendations. The House thereupon adopted the recommendations above set out, which had been transmitted with the approval of the Board of Governors.

Committee on Commerce

The report of the Committee on Commerce was presented by its chairman, Oscar C. Hull, of Michigan. The report was concerned with "Government Pre-view of Patent Contracts," a matter which had been referred to the Committee at the Philadelphia meeting. Mr. Hull stated that the Committee was making only a preliminary report and that a general report will be made at the September meeting. The preliminary report as outlined was received and placed on file.

Committee on Ways and Means

The Committee on Ways and Means then reported, through its chairman, Howard L. Barkdull, of Ohio. That part of its report that dealt with the subject of a proposed corporation to receive and hold gifts, bequests and endowments, for the educational and charitable work of the Association, was the subject of considerable interest and discussion. It was definitely suggested that if such a corporation had been in existence a few years ago an endowment of approximately \$50,000.00 would have been made to the Association under the will of a member, since deceased, but there being no corporation existing, the gift was not made. Considerable interest was evinced in the precise language of the provisions of the proposed articles of incorporation through questions from the floor. After further discussion a motion to refer the proposed articles of incorporation to the Committee on Draft for report on phraseology, scope and substance was adopted.

Section on Criminal Law

Federal Regulation of Elections—The Section of Criminal Law presented its report through its chairman, Professor James J. Robinson, of Indiana. The first proposal of the Committee was the endorsement of a bill designed to give the Federal Government power over fraudulent election practices, both as to nomination and election of federal officers. Sharp division of opinion and extended debate resulted from this proposal. Similar proposals have been before the House of Delegates at several previous sessions. By unanimous consent, debate on the proposal was opened by Arthur J. Freund, of Missouri, a non-member of the House of Delegates, who spoke in support of the motion to approve the bill. He cited the election conditions in St. Louis in 1937 and contended that it was only when the United States Government stepped in that prosecutions in Kansas City, Missouri, resulted in any convictions. He contended that the present federal law was inadequate so far as election prosecutions were concerned.

William Logan Martin, of Alabama, spoke in opposition. He pointed out that approval of such a bill by the House of Delegates would be "marching in the opposite direction from the one we have heretofore taken" since it would have a tendency toward further centralization of government in Washington. John T. Barker, of Missouri, also spoke in opposition. He referred to efforts to get similar legislation through Congress during the period following the Civil War, which resulted in the so-called "Force Laws." These laws died in four or five years and were finally repealed in 1894. He stated that if the proposed bill became a law "it simply means that the Federal Government will send, first a horde of men to see how people are going to vote. Then, after the voting is over, they will get the ballot boxes to see how they voted."

John H. Cantrell, of Oklahoma, spoke in favor of the bill. He stated, "If there are holes in the election laws, stop those holes." Mr. Murray Seasongood, of Ohio, also spoke in favor of the bill. He contended that "there was no more important means of preserving democracy than by disposing of the weak places in its armor. . . One of the greatest arguments that can be made by those desirous of overthrowing democracy is that our election laws are a mockery and a disgrace."

Professor Robinson thereupon closed the discussion, urging that the motion to approve the bill be adopted. The specific proposal was that the American Bar Association approve in principle Senate Bill 293, which is concerned with

Federal elections. A vote was first taken by show of hands, and objection being made, a standing vote was finally called for, which resulted in a tie vote, 66 in favor and 66 against the resolution. The resolution to approve the bill thereby failed of adoption.

Recess

The House thereupon recessed for luncheon at 12:45 o'clock, to meet again at 2:00 o'clock.

Second Session

Labor and Employment, Etc.

The House again convened at 2:00 o'clock, March 17th. The first order of business was the report of the Committee on Labor, Employment and Social Security, submitted by its chairman, Judge William L. Ransom, of New York. Judge Ransom stated that the Committee had followed closely developments as to proposed legislation in its field of law. For the first time in several years this Committee presented a unanimous report. The report related only to matters of Labor Law in the light of the national emergency. The Committee presented two recommendations. Recommendation No. 1 proposed that the Association favor the enactment of the so-called Ramspeck bill (H.R. 3489) to amend the National Labor Relations Act, in five respects, which are supported also by the American Federation of Labor. The amendments were, in substance:

A. To permit crafts, skilled employees, and recognized classifications of workers to retain their unity, as against plant units of employees or industrial unionism;

B. To protect and preserve the integrity and validity of collective bargaining contracts lawfully entered into;

C. To provide procedure to eliminate the delays in certification of collective bargaining representatives under Section 9 of the Act;

D. To give labor organizations the right of review in representation cases where nobody has such right under the present Act, as construed.

E. To enlarge the present board from three to five members for the purpose of expediting its business, and permitting its members to take part more actively in the hearing and decision of cases.

The recommendation of the Committee that the Ramspeck Bill (incorporating these amendments) be approved, was later adopted by the House.

The second and third recommendations of the Committee dealt with what should be done to prevent labor disputes, lock-outs and strikes from slowing

down industrial production. In this connection, the Committee recommended:

No. 2. That the Association favors the immediate establishment of a tribunal similar to the National War Labor Board of 1918, made up of representatives of organized labor, employers and the public, who will have the hearty confidence and respect of labor management and the public, with independent powers of mediation and conciliation at least equal to those of 1918, in adjusting labor controversies and preventing strikes and lock-outs, and in making and publishing advisory findings and conclusions concerning such controversies, such Board to act solely in behalf of the paramount public interests.

No. 3. That the Association urges that consideration be given to the establishment, also, by legislation or executive order, of regulations which will assure against the immediate calling of strikes or lock-outs and provide for a "cooling period" of 30 days or more, during which first the United States Conciliation Service, and then if need be the National Defense Board, shall make efforts to mediate and settle the controversy without stoppage of work.

Considerable pertinent inquiries and discussion took place on the floor of the House, participated in by Messrs. William Logan Martin, of Alabama, Sylvester C. Smith, of New Jersey, Frank W. Grinnell, of Massachusetts, Chauncey E. Wheeler, of Rhode Island, and Chairman Ransom. The latter's motion to approve these two last recommendations was unanimously adopted.

Real Property Law

The report of the Section on Real Property, Probate and Trust Law was presented by Mr. Charles H. Lyman, of Connecticut at the request of Harold L. Reeve, of Illinois, Chairman of the Committee. The report of the committee was printed at page 73 et seq. of the printed calendar of the House of Delegates. The first proposal of the Section was a resolution as follows:

That curtesy and dower and their statutory substitutes be abolished with property provision for the surviving spouse.

Mr. Lyman discussed the proposal and moved its adoption. The meaning and purpose of the proposal was further discussed by Messrs. James R. Morford, of Delaware; William M. Blatt, of Massachusetts; Sefton Darr, of District of Columbia; Frank W. Grinnell, of Massachusetts; Nathan P. Avery, of Massachusetts; W. E. Stanley, of Kansas; Clement F. Robinson,

of Maine; John T. Vance, of the District of Columbia. Upon a standing vote the motion to approve the resolution was lost.

Municipal Taxation

Mr. George M. Morris, of the District of Columbia, Chairman of the Section on Taxation, stated that his Section recommended that the House of Delegates approve a resolution which had originated with the Section on Municipal Law, and had been referred to the Section on Taxation for consideration and report. The resolution urged that the Public Salary Tax Act of 1939 be amended so as to relieve State and local officers and employees, paid in whole or in part out of Federal funds, of retroactive Federal income taxes on salaries received prior to January 1, 1939. After some comment by Mr. Morris, Mr. William G. Chanler, of New York, Chairman of the Section on Municipal Law, was recognized. He moved the approval of the resolution above referred to in the remarks of Mr. Morris. Secretary Knight stated that the resolution was transmitted by the Board of Governors with a recommendation that it be adopted. Mr. Murray Seasongood, of Ohio, offered an amendment to the effect that a similar amendment to the Salary Act of 1939 be provided, if one has not already been introduced, and that it be approved. Mr. Chanler stated that he had no objection, and the resolution as amended was adopted.

Mr. Chanler next moved the approval of a resolution which had been adopted by the Section on Municipal Law and presented to the House of Delegates at the Philadelphia meeting, and at that time referred to the Committee on Taxation. That Committee referred it back without recommendation. The resolution was as follows:

That if the existing immunity from taxation by the Federal Government now applying to public securities is to be abolished, either as to interest or principal, in the opinion of this Association the question of such abolition should be first submitted to the several States for the approval of a properly drawn amendment to the Constitution of the United States to accomplish that purpose.

The proposal was discussed at some length by Mr. Chanler. He concluded his remarks by hoping that the House would approve the proposal for such Constitutional amendment. Mr. Murray Seasongood, of Ohio, then offered an amendment to provide that the public securities referred to in the resolution should include those "issued by state, local subdivisions, or state and local authorities." Mr. Chanler accepted the

amendment. Past President Charles A. Beardsley, of California, then addressed the House in favor of the resolution. The motion to approve the resolution as amended was adopted.

At 5:00 o'clock, the House recessed until evening.

Third Session

The House reconvened at 8:30 o'clock, the same evening, Chairman Gay presiding.

Patent Law

The Report of the Section on Patent, Trade-Mark and Copyright Law was presented by Mr. Loyd H. Sutton, of Washington, D. C., Chairman of the Committee. Recommendation No. 2, of that report as printed on page 54 in the Calendar of the House, was taken up. It proposed an amendment to Section 64 of the Copyright Law (Title 17, U. S. Code) and was concerned with registration of certain claims. Chairman Sutton commented on this proposal and moved its adoption. Secretary Knight announced that the Board of Governors had considered the proposal and transmitted it without comment. The motion was adopted.

Recommendation No. 6, appearing on page 56 of the printed Calendar of the House, was concerned with a new Trade-Mark Act. Mr. Sutton called attention to the fact that in 1940 the House of Delegates adopted a resolution that the existing Federal Trade-Mark Act be revised and extended so as to protect trade-mark owners to the fullest extent of the powers of Congress. Mr. Sutton commented at some length on Proposal No. 6 and moved its adoption. The motion, after some further comment, was adopted.

Committee on Taxation

The report of the Section on Taxation was presented by Chairman George M. Morris, of the District of Columbia. The first proposal made by the Committee concerned the need for "an independent review" of tax claims (other than processing taxes). The Chairman moved the adoption of a recommendation for the amendment of Title VII of the Review Act of 1936 by striking therefrom certain provisions in Sections 601 and 602 and adding thereto a new Section 604, to read:

Concurrent with the Court of Claims, District Courts of the United States shall have jurisdiction of cases to which this title applies, regardless of the matters in controversy, provided suit is commenced within two years after the enactment of this amendment or the rejection of the claim for refund by the Commission-

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The motion, after discussion, was adopted.

Chairman Morris then explained that a further recommendation was made necessary by the passage by Congress and approval on March 7th of certain amendments to the 1941 Excess Profits Tax Act. A sudden situation had been brought about by such amendments which seemed to require authority from the House to authorize the Tax Section, through its Excess Profits Tax Committee, to go into the matter. Chairman Morris moved the approval of the following resolution:

That the American Bar Association recommends to the Congress that any high-rate excess profits tax in the calculation of which base period income or invested capital is an element should include a provision under which excessive hardship due to abnormalities of income or invested capital, not expressly relieved in the law, may be relieved by the Commissioner, subject to revise by the United States Board of Tax Appeals. The resolution authorizing the Tax Section to go into the matter was adopted.

Commercial Law

The report of the Section on Commercial Law was submitted by John M. Niehaus, of Illinois, its chairman. After an extended explanation, Chairman Niehaus moved the adoption of the following resolution:

RESOLVED, That should a bill be immediately proposed revising bankruptcy administration, the House of Delegates authorize the Section of Commercial Law to request Congress to delay action until there is sufficient opportunity for further study and consideration of the proposed legislation.

The resolution was adopted.

Legal Education

The report of the Section on Legal Education and Admission to the Bar was submitted by W. E. Stanley, of Kansas, Chairman of the Committee. The Chairman presented a recommendation and moved its adoption, as follows:

BE IT RESOLVED, That the School of Law of the University of Miami be provisionally approved as complying with the standards of the American Bar Association.

The Chairman explained that favorable action had already been taken by the Council on Legal Education; that the University of Miami Law School had been under inspection for a period of approximately four or five years; and

that the University as a whole had been approved by the Southern Association, which is the rating authority for approving universities. The motion to approve the resolution was adopted.

National Defense

The report of the Committee on National Defense was presented by Mr. Edmund Ruffin Beckwith, of New York, Chairman of the Committee. Chairman Beckwith made an extended explanation of the report and of the work of his committee. He concluded as follows:

We began by saying that the Bar either had no function in the area of national defense, or else it must be regarded as a public agency, and then that grew a little bit, and we began to say the organized Bar is counsel, considering the public its client, until finally we were able to reduce that to a statement, the organized Bar is the public's lawyer. Now, if that concept is sound, as your committee believes and submits it to you, then the work of defense, whether it can be in service to the individual, or in organized and being ready, or in research and study of what the Bar may do, come what may, all resolves in the end, as a matter of principle, to the one thing, that acting as a good and faithful lawyer would always act, the organized Bar for its client, the public, will plan and lead, and to the end will fight a good fight for the protection of the rights of its clients. I submit that to you.

No action was requested by Chairman Beckwith.

Committee on Ways and Means

The report of the Committee on Ways and Means was submitted by Mr. Howard L. Barkdull, of Ohio, Chairman of the Committee. The report of the Committee was printed at page 48, et seq., of the Calendar of the House. In explaining the report, the Chairman said:

In order to raise the funds which are needed, and in fact, partly expended already for financing our participation in national defense, and for carrying on the work of Judge Parker's Committee, and for making up the amount of dues of our members entering military service, the Committee on Ways and Means, with the support of the Budget Committee, and with the approval of the Board of Governors, recommends an intensive campaign for sustaining members. We believe that this is the best method for raising the necessary funds.

The authorization is already in the By-Laws of the Association, and no action is called for from the House

at this time, the present purpose being to let every member of this House know that we will rely upon the help, support and cooperation of each and every one of you in getting these sustaining members. The Budget Committee of the Board of Governors tells us that \$25,000 is needed this year. That means 1,000 sustaining memberships of \$25 each in addition to regular dues. Now, during the fiscal year ending June 30, 1936, we obtained 367 sustaining members; 1939, 275; 1940, 308, and what the Ways and Means Committee is called upon to do this year is to get three times as many sustaining members as in any previous years.

Our plans include the holding of meetings in the principal cities of the country, for the explanation of the situation and the signing up of members. The organization of the country is in six districts, each in charge of a member of the Ways and Means Committee, plus someone on the West Coast, a complete announcement in the JOURNAL, the sending of letters to the larger law firms, but most of all we are going to rely upon the complete cooperation of every member of this House.

You have received today the sustaining membership blanks that have been placed upon your desks. The need is here, gentlemen. Most Americans, past military age, are asking, "What can I do?" and here is at least part of the answer. You can make it possible for the American Bar Association to place in the hands of our Defense Committee the money for the doing of the things which Mr. Beckwith has so ably explained to you here tonight, and concerning which we will hear from Judge Parker tomorrow morning. So your Ways and Means Committee asks every member of this House to put his shoulder to the wheel, and if you do, we will go far beyond that 1,000 mark of sustaining membership which the Budget Committee has asked us to get. [See page VI this issue.]

Budget Committee

The report of the Budget Committee was presented by Mr. Carl B. Rix, of Wisconsin, Chairman of the Committee. He said:

As you know we have been operating on a balanced budget. There are several items that came into the picture this year which came in after the budget was prepared. There wasn't any question as to whether or not this work of National Defense should be supported. There has never been any doubt in the minds of the Board of Governors on that point.

The Board has also given unreserved support to the remarkable work which Judge Parker and his committee have been doing, on the basis that it is part of the national defense.

We are confronted with another condition which will be evident to all of you. You heard the resolution remitting the dues of any men in service. We have no way of estimating yet as to what that remission will amount to. Probably for the current year it will not amount to a great deal, owing to the slowness of the induction of the service plan, but for next year it probably will be much larger than we can anticipate. Therefore, we feel that in any budget of this year we must make provision for the extraordinary provisions of next year. It is for that reason we have cooperated closely with the Ways and Means Committee.

We were confronted with the question of either using the machinery which had already been set up, and which over the past three years has produced revenue for this Association of approximately \$25,000. We felt that a tried machinery of that kind, with proper effort, could be made to work. For that reason the Board of Governors approved the proposal of the Budget Committee on the Ways and Means Committee, that the Ways and Means Committee take steps immediately to secure the sustaining memberships in the number of not less than 1,000 for the work of this year. It is manifest that if we could get that for this year, our problem for the next year is probably solved, and probably for as long a time as this becomes necessary.

It has fallen to my peculiar lot twice in the history of this body to be called upon to help in the raising of money in a time of a crisis. I feel certain that just as the members of the Association did not fail us before, they will not fail us now. When we go into your states we ask for the active support of each of you, because a negative reply will be disastrous, and still worse would be an indifferent reply. We ask for your active, energetic cooperation.

This morning I had occasion to speak to a small gathering, and inside of 15 minutes I was handed the first check. During the day, as a result of these cards being issued, we have received a number, and we hope that we will receive a considerable number more before you leave. We appreciate your support, and we feel that we are entitled to ask for it under these difficult conditions.

Recess

The meeting recessed at 9:40 o'clock until the following morning at 10:00.

Fourth Session

THE House convened, Tuesday, March 18th, at 10 a. m., Chairman Gay presiding.

Judge Parker's Committee

The report of the Committee on Improving the Administration of Justice was presented by Judge John J. Parker, of North Carolina, its chairman. Judge Parker made a vigorous and eloquent address which held the rapt attention of the House of Delegates. His address can not be fully or fairly set forth here and it is hoped that it may be used at another place and time. He concluded by saying:

"Ruskin says it pertains to the minister to teach, the doctor to heal, to the lawyer to give peace and order to the community. Well, what I am saying to you is in the performance of this duty the American people have the right to expect of the American Bar that they shall do it efficiently."

Public Relations

The report of the Committee on Public Relations was submitted by Mr. Raymer F. Maguire, of Florida, chairman of the Committee. Chairman Maguire explained at length the desirability of having sound, proper and adequate publicity for the activities of the Association. He said that with the approval of the Committee on Administration, the Committee on Public Relations had recently engaged a part-time publicist, Mr. F. M. Van Voorhees, of New Jersey, a newspaperman who has long been interested in reporting legal matters, and who seems to have an extraordinary understanding of the scope and extent and purposes of the American Bar Association. [Mr. Van Voorhees was present at Chicago, in charge of press relations, a post that he has filled at two annual meetings.] Mr. Van Voorhees has been getting rather extraordinary results through well written releases, stated from the standpoint of the American Bar Association. These releases have been exceptionally well received.

Aeronautical Law

The report of the Committee on Aeronautical Law was presented by Mrs. Mabel Walker Willebrandt, of the District of Columbia, Chairman of the Committee. The report of the Committee was printed in the Calendar of the House of Delegates, pages 10 to 16. Mrs. Willebrandt made an extensive explanation of the report and the work of

the committee. She thereupon moved the adoption of the first recommendation of the committee that:

The American Bar Association withhold endorsement of recommendation of a Uniform Regularity Act approved in 1935.

Secretary Knight announced that the Board of Governors, after considering that recommendation, transmitted it with the comment that the attention of the House be called to the fact that the recommendation involves revision of the action taken by the Association in 1935; and further, that the recommendation is not wholly in accord with the body of the report. On motion of Mr. Sidney Teiser, of Oregon, the motion of Chairman Willebrandt to approve the recommendation was laid upon the table by a vote of 54 to 43.

Chairman Willebrandt then moved the adoption of the second recommendation, which was as follows:

That the Standing Committee on Aeronautical Law be authorized to cooperate with the Section of International and Comparative Law and the Committee on Admiralty and Maritime Law in a further study of the subject of salvage of aircraft at sea and the bill S.7, and that pending the Association's next meeting, your Committee be authorized to oppose the passage of the bill S.7 in its present form.

Secretary Knight announced that after consideration by the Board of Governors, the resolution was transmitted with the recommendation that it be not approved, but that in lieu thereof the Committee on Aeronautical Law consider the matter jointly with the Committee on Admiralty and Maritime Law and the Section of International and Comparative Law and make a joint report to the House at a future session. On motion of Mr. Jesse A. Miller, of Iowa, the recommendation of the Board of Governors was approved.

Chairman Willebrandt next moved the adoption of recommendation No. 3 which was as follows:

That the American Bar Association, by appropriate resolution, recommend to the Department of State and the Civil Aeronautics Board the organization forthwith of a United States National Commission to become affiliated with the CAPA, and that the United States Government, through such media as may be proper, foster and encourage the organization by the respective American Republics of National Commissions within their countries, to become affiliated with the CAPA.

That the members of your Com-

mittee be authorized to confer with representatives of the Department of State and the Civil Aeronautics Board, for the purpose of rendering such assistance as may be proper in connection with the organization of such National Commission.

Secretary Knight announced that after consideration the Board of Governors transmitted the proposal with the recommendation that it be not approved in that form, but that the Committee of Aeronautical Law and the Section of International and Comparative Law collaborate as to a joint report on the subject matter of the recommendation.

Mr. Jesse A. Miller, of Iowa, moved that the recommendation of the Board of Governors be concurred in.

At this point, Past President Charles A. Beardsley moved that Chairman Willebrandt be heard further on the matter, and the Chairman of the Committee was heard further and at length. After some considerable discussion, the motion of Mr. Miller that the recommendation of the Board of Governors be adopted was approved upon a rising vote by a vote of 59 to 43.

Judicial Salaries

The report of the Committee on Judicial Salaries was presented by Chairman John Perry Wood, of California.

Chairman Wood stated that the Committee had no formal report to make, but he called attention to the problems before the Committee and asked for a greater measure of cooperation from the membership. He spoke at some length in explaining the problems before the Committee in the different parts of the country. In conclusion he said:

"I do beg that we may have a bit more support from the members of this House. The burden is upon the men in the individual states. The Association can do very much to encourage them and to help them. There are various problems, various strategies that are useful in the accomplishment of what has been accomplished in Missouri. The Association can be of help in that regard, but it is the membership of this House to which the Bar must look for the accomplishment of better things in the administration of justice, and particularly for the accomplishment of that primary objective of making the man who sits on the bench a man devoted, capable, imbued with a passion for justice and independence of influences which are upon him under the elective process."

Legal Aid

The report of the Committee on Legal Aid was presented by Chairman Harrison Tweed, of New York. He stated that a year ago his Committee asked for an appropriation from the Association

of \$5,000 to carry on what it considered the necessary work of spreading organized legal aid throughout the country. The Committee did not get the \$5,000, but still thinks it should have it. However, the Committee was not asking for it again. He said, among other things:

We think the public is going to learn, and the lawyers are going to learn that it is the duty of the Bar to take care of those who cannot afford to buy legal service. The demonstration of public service that is being made by the National Defense Committee, and the work that it does is going to aid the cause of the "Legal Aiders" more than anything that we ourselves could do. It is a demonstration in a particular field, of the work that we have always wanted to do, and tried to do.

We are not going to do nothing simply because we haven't got the money we would like to have to do things with, or because others are doing a similar kind of work for the good of the Bar. We are trying to do what good lawyers, I think, always should do. When they can't get anybody else to work for them they do the work themselves. So in our Committee, which consists of five lawyers from five different states in the Union, Iowa, Michigan, Wisconsin, Massachusetts and New York, each one of us has said that we will try in our own locality to take the places which are most in need of legal aid, namely, the larger cities of over 100,000 population; that each one of us in one of those cities will try to get an efficient legal aid system going so that the poor there may have the justice to which they are entitled. Also, we are going into each of our states, and particularly in one of the largest cities, to investigate what need there is for further care of the poor in the criminal courts.

Another thing that the Committee is going to try to do is to see what need there is for statutes which will diminish the cost of proper litigation for the poor. A few of us think the greatest difficulty in going into the court is not that we have to pay a lawyer, but that if you have a very, very modest earning per week, you also have to pay the court costs. Court costs are as far beyond the means of millions of people in this country as is the cost of the most highly paid lawyers above almost everybody else.

Economic Condition of the Bar

The report of the Committee on the Economic Condition of the Bar was presented by Mr. John Kirkland Clark, of New York, its Chairman, who made a short but effective report. He said:

I have got a one-page report. I am not even going to digest or elaborate on it. (Laughter.) I am just going to ask you to take it home and read the last paragraph and act on it. Most people seem to think that the question of the economic condition of the Bar is that exemplified by the man who, in answer to the question on the income tax blank, "State the nature of business," replied, "The answer, sir, is lousy." (Laughter.) Please do take this home and see that your organizations get ready to cooperate when this other effort is over.

Admiralty Law

The report of the Committee on Admiralty Law was submitted by Mr. Arnold W. Knauth of New York, a member of the Committee, in the absence of Mr. Cody Fowler of Florida, its Chairman. The report of the Committee was printed on pages 6 to 9, inclusive, of the printed Calendar of the House of Delegates. Mr. Knauth explained the report and stated that the first recommendation concerned the rule-making power of the Supreme Court in all admiralty cases. The recommendation of the Committee was that it be authorized to proceed in the matter in collaboration with the Maritime Law Association.

Secretary Knight stated with respect to this recommendation that the Board of Governors had considered it and had transmitted it with the recommendation that it be not approved in its present form; but that in place thereof, the Committee be authorized to collaborate with the Maritime Law Association in the study of the desirability of legislation to enlarge the power of the Supreme Court to make Rules of Admiralty, the Committee to report at a later meeting of the House its specific recommendations, accompanied by a draft of any bill which the Committee may wish to propose for consideration to the House.

Mr. Chauncey Wheeler, of Rhode Island, moved that the recommendation of the Board of Governors be substituted for that of the Committee. Mr. Knauth stated that there was no objection to the recommendation of the Board of Governors. The substitute recommendation approving the recommendation of the Board of Governors was adopted.

The second recommendation of the Committee had to do with what is called "amphibian torts." A bill concerned with that topic, S. 680, has been specifically endorsed by the Committee and by the American Bar Association. (63 A.B.A. Rep. 147 and 210.) Secretary Knight announced that the Board of Governors had considered this recommendation and transmitted it with ap-

proval. The motion to approve the recommendation was thereupon adopted.

Committee on Draft

The report of the Committee on Draft was presented by Mr. John Kirkland Clark, of New York, its Chairman. He stated that the Committee had one matter referred to it which had already been reported and approved by the House

yesterday. That was the report of the Committee on Ways and Means, concerning the incorporation of an endowment corporation for the American Bar Association, which had been referred to the Committee on Draft. The recommendation of the Committee on Draft, together with that of the Chairman of the Committee on Ways and Means, was that the matter receive further

study. The Chairman requested that all members of the House who had constructive ideas or critical ideas forward them to the Committee. The report of the Committee was approved.

Adjournment

The House having finished all business before it, thereupon adjourned at 12:30 o'clock, Tuesday, March 18, 1941.

JUNIOR BAR AT MID-YEAR MEETING

THE Mid-Winter Meeting of the Officers and Executive Council of the Junior Bar Conference was held at the Edgewater Beach Hotel, Chicago, March 15 and 16. National Chairman Lewis F. Powell, Jr., Richmond, Va., presided. A state by state report was made on the progress of the Conference program in the circuits represented by the following members of the Council: 1st, Leslie P. Henry, Boston, Mass.; 2nd, H. Graham Morison, Jr., New York City; 3rd, Joseph D. Calhoun, Media, Pa.; 4th, Ben Scott Whaley, Charleston, S. C.; 5th, William B. Carsow, Austin, Texas; 6th, James A. Gleason, Cleveland, Ohio; 7th, Willett N. Gorham, Chicago; 8th, John W. Oliver, Kansas City, Mo.; 9th, Harold W. Schweitzer, Los Angeles, Calif.; 10th, James D. Fellers, Oklahoma City, Okla. A definite increase in activity is expected from each state so that this Conference year will be the most productive since the formation of the Conference.

Conservation of Practice

Joseph D. Calhoun, Chairman of the sub-committee on the conservation of practice of lawyers called into military service presented a report recommending that the chairman of the Conference issue a call to all local and state bar associations and to all junior committees or sections thereof to form committees to study the question. The Council unanimously approved the recommendation.

National Defense

The Public Information Program has been requested by the Office of Production Management to provide speakers on National Defense. The Council approved the action of National Director Paul F. Hannah and his associates in providing such speakers. It is believed to be of prime importance that lawyers generally and bar associations in particular cooperate with all government agencies engaged in the preparation for national defense.

Radio Broadcasts

Chairman Powell presented a proposal from The Town Hall, Inc., for a suggested plan of cooperation with the radio program, "America's Town Meeting of the Air," dedicated to developing an informed public opinion. The Council approved the plan and authorized the officers to select a limited number of communities suitable for that purpose.

National Director Paul F. Hannah advised the Council that sixty radio broadcasts have already been presented to an estimated radio listening audience of seventeen million persons. There are eighty-one radio broadcasts already scheduled for the next few months and many more are in the process of preparation.

Surveys

National Director Paul B. DeWitt, Des Moines, Iowa, in charge of Procedural Reform Surveys, reported that substantial progress was being made in the surveys now taking place in every state on the subjects, "Rule Making Powers," "Pre-Trial Practice," "Judicial Councils" and "Summary Judgments." The services of nationally known men have been secured to summarize the results of the studies.

Earl F. Morris, Columbus, Ohio, Chairman of the Committee in Aid of Small Litigants, informed the Council that the nationwide survey of the "Justice of the Peace System" has been completed in eighteen states and the balance of the reports should be received within the next few months. The work of his committee in the small loan field is moving ahead in accordance with previously arranged schedules and should be ready for a final report at the Indianapolis meeting.

Regional Meetings

Vice Chairman Philip H. Lewis, Topeka, Kansas, reported on all regional meetings of junior bar executives held in conjunction with the Section of Bar

Organization Activities. Regional Meetings are now scheduled for Memphis, Tennessee, on April 3rd and Richmond, Virginia, on April 7th.

Willett N. Gorham, Chairman of the Membership Committee, reported that results are not good up to date and that every member of the Conference should be on the alert to secure new members. A quick survey of the Council membership revealed that unless unforeseen developments take place, a substantial minority will be in military service before the next annual meeting.

Local Items

The New Jersey State Chairman, Herzel H. E. Plaine, Newark, N. J., addressed the newly admitted lawyers at the Supreme Court exercises held on March 3, 1941, at Trenton, N. J. He took the opportunity to urge the active participation of these men and women in bar association activity and indicated ways in which they could assist.

Curtis Heath, Chairman of the New York Monthly Luncheon Committee, reported that the speakers at the February 13, 1941, meeting were Norman Thomas and Grenville Clark, who debated the subject, "Should This Country Underwrite Britain's War Effort."

Alvah T. Martin, Chicago, Chairman of the Younger Members Committee of the Chicago Bar Association, reported that they sponsored a three lecture series on "The Lawyer and National Defense." The speakers and topics were: William M. Keeley on the Selective Service Act; Elbridge B. Pierce on Soldiers and Sailors Civil Relief Act; and Willard L. King on Civil Liberties and National Defense.

James Miner, Owosso, Michigan, has recently been appointed Chairman of the Junior Bar Section of the State Bar of Michigan and is taking steps to formulate an aggressive program.

JAMES P. ECONOMOS,
Secretary.

Mid-Winter Meeting of Board of Governors

PRECEDING the Mid-Winter Meeting of the House of Delegates reported elsewhere in this issue, the Board of Governors of the Association held six sessions, on March 15 and 16, and also March 18. Problems of Association administration, which have been increased by the national and international emergency, were considered; consideration was given also to reports of Sections and Committees prior to presentation of such reports to the House of Delegates. Consideration of these matters necessarily brought forth extended discussion.

President's Report

President Jacob M. Lashly reported on the work of furnishing speakers at law schools to discuss the work of the organized Bar. He stated that a large number of replies had been received from the Deans of the various law schools and that a substantial number of members of the Association had already spoken before various law schools in its behalf.

President Lashly also informed the Board of Governors of the acceptance, by approximately 75 members of the Association, of their appointments as delegates of the Association to the first annual conference of the Inter-American Bar Association in Havana, Cuba, beginning March 24th.

The President's report also included information concerning replies which he had received to letters sent by him to all judges of courts of record in the United States, pursuant to authority of the Sub-Committee on Administration of the Board of Governors. That letter had directed attention of the judges to the time of the next annual meeting of the Association and had suggested that they might be willing to arrange their calendars so that members of the local Bars might be able to attend the annual meeting. The President reported that to date over 600 replies had been received from the judges, all of which expressed great interest in the Association's program for national defense and in the program for improvement of administration of justice. The judges offered cooperation in facilitating the attendance of members of the Bar at the Indianapolis meeting.

Treasurer's Report

Treasurer John H. Voorhees presented his report, which indicated that the Association is operating within its budget, despite some loss of revenue from members who have either volunteered or been inducted into military service. The Treasurer interposed a note of caution that provision must be made for anticipated future loss of

revenue, as well as for increased expenditures occasioned by the vitally necessary work of the Committee on National Defense and the Committee on Improving the Administration of Justice. This cautionary note was apparent also in the report of the Budget Committee.

Sustaining Memberships

The Board of Governors gave unanimous support to its Ways and Means Committee in its important work of securing sustaining memberships to meet the financial needs of the Association, to make good the losses of revenue of our members in service and to carry on the work of the Defense Committee, and of the Special Committee for Improving the Administration of Justice.

The Board of Governors had previously adopted a resolution exempting all members entering the military service of the United States from the payment of dues during the period of such service.

Section Activities

The Board of Governors approved a resolution adopted by the Sub-Committee on Administration at a meeting held on January 18, which carried out a recommendation adopted by the conference of Section Chairmen at a meeting held in Chicago last October which defines more clearly the work of the sub-committee of the Board of Governors on Section activities. Under that resolution the power of the sub-committee is extended to coordination and appraisal of the work and structure of the Sections with a view to better coordination of their work and to secure improvement in their functioning. Carl V. Essery, of Michigan, is the present chairman of this sub-committee. This action of the Board of Governors was one of the items of its proposed action which was later specifically approved by the House of Delegates.

New Committee Disapproved

At the Philadelphia meeting a resolution was submitted, proposing the creation of a special committee on legal history. That resolution was referred by the House of Delegates to the Board of Governors. The Board of Governors at its current meeting disapproved the creation of such a committee, at this time, in view of the urgent need of devoting the energies and resources of the Association to selected matters of greater emergency during the present critical period.

Section By-Laws

The Board of Governors gave its approval to certain amendments of the

By-Laws of the section of Judicial Administration; also to amendments in the By-Laws of the Junior Bar Conference.

Ross Essay Contest

It was reported to the Board of Governors that 50 essays have been submitted in the Ross Essay Contest and that a distinguished committee of judges, consisting of former president William L. Ransom, of New York, Justice William O. Douglas, of the United States Supreme Court, and Dean J. A. McClain, of the Law School of Washington University at St. Louis, have been selected to pass on the essays submitted.

Review of Reports of Sections and Committees

A substantial part of the work of the Board of Governors which occupied a major portion of its time, consisted of consideration of proposed reports from Sections and Committees, which were later submitted to the House of Delegates. Article IX, Section 4 of the Constitution of the Association provides that reports of Sections and Committees shall be transmitted "to the House of Delegates through the Board of Governors." The same provision of the Constitution provides that "no report, recommendation or other action of any Section or any Committee shall be considered as the action of the Association unless and until it has been approved or authorized by the House of Delegates or by the Board of Governors."

In actual practice, the Board of Governors has considered it to be its duty under this section of the Constitution to exercise a large measure of preliminary scrutiny over the recommendations of Committees and Sections, for Association action. This sincere and conscientious work and responsibility of the Board of Governors was later recognized by the House of Delegates, as shown by the fact that the House of Delegates consistently called for the reported action of the Board of Governors on Committee and Section reports before the House of Delegates itself acted on such reports.

Memorial to George R. Grant

A deep sense of loss and sadness was felt by all members of the Board of Governors because of the passing of George R. Grant, of Massachusetts, who died December 29, 1940. The Board of Governors at its first session adopted a resolution embodying its sentiments in that regard and its expression of condolences to his family. Similar action was later taken in the House of Delegates.

THE EDITOR-IN-CHIEF REPORTS

AT the mid-winter meeting of the House of Delegates in Chicago, Maj. Edgar B. Tolman, Editor-in-Chief of the JOURNAL, by special request of President Lashly, reported on its present situation and future plans. Maj. Tolman has been Editor-in-Chief of the JOURNAL since 1921. His appearance was greeted with applause. He said, in part:

"It is particularly fortunate that in the case of the JOURNAL very much better news can be reported. Due in part to the financial condition of the country in the thirties, and due in part, also, to the added expense imposed upon the JOURNAL by the greater activity of the Association, its Sections, its Committees, and its work generally, the income of the JOURNAL was found, a year ago, to have suffered considerable diminution. This condition was also due in part to an out-moded method of selling advertising. In this situation, the Board of Editors, the Board of Governors, and the Budget Committee gave serious and prompt attention to the matter.

Advertising

We have been favored by the assistance of expert advice in regard to our advertising. In the first place, these experts told us that our method of selling advertising space was defective and that the JOURNAL should have immediately an exclusive advertising representative, who would represent the JOURNAL and no one else. That change has been put into effect. As you no doubt have already noticed in the JOURNAL, Mr. Otto Holbein, an experienced advertising man, has been put in charge of our advertising and through his efforts very considerable gains have been effected.

In the second place, the advertising rates of the JOURNAL were declared by our advisers to be out of line and very much lower than the rates that obtained in other magazines of comparable standing and circulation. We were met there, of course, with the question whether our old-time substantial advertisers would stand a substantial increase in rates. Nevertheless, we raised the rates, as advised. Our advertising customers have long been largely made up of law-book publishers. Through the persuasive and able efforts of our Managing Editor, Mr. Lavery, who himself came to us from the law-book publishing field, we found, with great satisfaction, that every one of our substantial advertising customers in the law-book publishing world has cooperated fully with us, and have willingly accepted the new rates. We find ourselves, therefore (partly because of increased volume and partly because of increased rates), in the agreeable position of having an immediate and present rise in our advertising revenue which will amount to not less than \$5,000 a year. And more is expected. Our thanks go to our advertising friends.

A Better Journal

Our motives in endeavoring to increase our advertising revenue are entirely bottomed upon our desire to be able, on financial grounds, to publish a better JOURNAL for the members of our Association. That hope is well on the way toward realization. It costs more to publish a better JOURNAL than we have been publishing, and yet the added cost that we have ventured to assume will be more than made up, we are confident, by our added revenue, and by reduced printing costs which we have effected.

A Poll of Our Readers

One other thing I want to call to your attention. Our advertising experts said that we must find, by actual exploration, the buying habits of our members. Accordingly, we sent out a sort of "Gallup Poll" to 2,000 members of our Association, selected at random, and from every state in the Union. We asked for replies in regard to their buying habits, and other matters that

would interest prospective advertisers. The experts tell us that we have gotten together by that method a very valuable lot of information that will be persuasive in the sale of advertising space.

As Editor-in-Chief, I took the liberty of tagging onto the poll questions with regard to the editorial management, format and content of the JOURNAL. I think it will be interesting to tell you the result of that editorial poll.

Results of Poll

In the first place, the poll brought, from the 2,000 members, 740 replies. That is, 37 per cent of the men who received the questionnaire answered it. We are told by those who know about such polls, that 3 per cent is often all that can be obtained and that 10 per cent is considered excellent. The 37 per cent of replies which were received indicates a deep interest in the JOURNAL, on the part of our members—an interest that is quite extraordinary and is most gratifying.

I will not trouble you with the details of this editorial poll because we will be able to give that later in better form. But out of the 740 members who wrote in on the subject, more than 600, in reply to the question, "What if any changes shall be made in the general method of conducting the JOURNAL, its form, style and content," said in substance, "Go on as you are now doing."

There were, however, some specific suggestions made with regard to changes in the JOURNAL to which the Board of Editors intend to give careful consideration; because a Board of Editors completely satisfied with what it is doing can't be expected to improve very much.

The Journal as an Open Forum

There are two things that I might add, speaking only for myself. The first is that the JOURNAL recognizes the right of freedom of speech and the right of "minorities" to have a voice and to be heard freely. But that right, as Mr. Justice Frankfurter has said, is a relative, and not an absolute right. In determining how much of our limited space is to be given to the "minority" for the presentation of its views, the controlling questions, of course, must be the importance of the subject, the importance of the views expressed, the ability and fairness with which they are presented, and the amount of information and interest which they will afford to the JOURNAL's readers. There have been criticisms against the expression of "minority" views in the JOURNAL. The JOURNAL never expresses editorial opposition to any declaration of policy that the House of Delegates has taken. The JOURNAL has at times permitted those who have voted against the action of the House of Delegates to be heard in an orderly fashion, and when that which was tendered was fit for print. [Laughter.]

The Journal as an Intellectual Force

Finally, there has been a question as to how far the JOURNAL should continue to deal with the intellectual side of the lawyer's life. Some people have said the JOURNAL must not enter into competition with the law school reviews. Of course, the JOURNAL does not enter into competition with those reviews. The JOURNAL deals pragmatically with the discussion of legal questions. We take the point of view of the practitioner. Other law magazines frequently take the abstract and theoretical view. With that distinction in mind, I think you will see that there is no real competition between the JOURNAL and the reviews of the law schools. I believe that it must never be forgotten that the law is a learned profession, and any failure to recognize that characteristic of the lawyer's life, any failure to take into account the intellectual side of the lawyer's activities would be to neglect the performance of a distinct and direct duty."

INTERNAL ASPECTS OF NATIONAL DEFENSE: THE SPECIAL RESPONSIBILITY OF LAWYERS*

By ARTHUR T. VANDERBILT
Former President of the American Bar Association

IN these days, when we are all concerned with the preservation of liberty and the complicated problems of national defense, none of us can read *Ambassador Dodd's Diary, 1933-1938*, and his revelations of the Nazi program of aggression without asking the question, why did not the leaders of the democracies of the world do something about it *then*? The question has not been satisfactorily answered, if, indeed, it can ever be, either here or abroad.

And yet, when we ask this momentous question, how many of us are at all aware that there is another equally vital question pending that we must answer and for which we, as lawyers, are chiefly responsible?

We shall not be achieving national defense—and here we come to the crux of the problem that confronts us—merely by preparing ourselves against invasion, or even by successfully overcoming the aggressor. Even if the liberty-loving people of the world prevail over the exponents of the totalitarian system—and I pray God that they may—we still must face the titanic economic and social upheaval that will follow in the wake of military conflict. Every war inevitably forecasts subsequent depression. The wider the scope of the war and the longer its duration, the worse the inevitable backwash. It affects belligerents and nonbelligerents alike. It propounds the same question as does war itself: Can we take it?

In the joyriding twenties we thought we had overcome economic law and reached a new plateau of permanent prosperity. In the doleful thirties we still fancied we could out-maneuver economic law, with the result that we have moved into the present crisis with the problem of unemployment still unsolved (except for current temporary military activities), with our public debt greater than it ever has been in the history of the country, with the nation quite unprepared to meet totalitarian mechanized warfare and with no little doubt as to the solidarity of our national morale. The grave question then is: Have we the wisdom and the fortitude to prepare for defense and, if necessary, war and also to prepare, at the same time, for the ever greater problems of peace and readjustment after war?

Of the two responsibilities, the problems of national defense are the easier ones to meet. Our people react swiftly to foreign interference, especially from those whose ideas differ from ours. The necessity of preparing for national defense, moreover, is more obvious than the necessity of preparing for peace; things were good enough in the past, so why not now? The solutions of the problems of war do not involve so great a disturbance of the *status quo* within the country as do the solutions of the problems of peace. But, quite clearly, it will do us no good to save ourselves from military aggression or even to save the entire world, if we have not at the same time prepared to save ourselves in peace. To prepare for war, if need be, and at the same time to prepare for peace, particularly in view of our experiences of the past twenty years, is the toughest job that this country has ever undertaken. It will, indeed, be a test of our national character.

*This is the fifth of a series of articles to appear in the JOURNAL on the general subject of improving the administration of justice throughout the country as a part of the National Defense Program.

The disorganization and maladjustments that must necessarily follow the change from a wartime regime to a peacetime mode of national life will lead, as it always has in the past, to conflicting demands. Labor will reach out for more power. Capital, which, after all, is but the accumulated fruit of earlier labors, will endeavor to defend its rights. The State must be stronger than either. To be strong, it must command popular respect, and this it can only do through effective government under enlightened leadership of unquestionable integrity. Enlightened leadership in private life is equally necessary to protect our elected officials, both in the executive and legislative departments, from the sabotage of pressure groups either within or without the government.

In this process of readjustment there will be pressure on our courts such as we have never known before. To safeguard against such pressure is the especial responsibility of judges and lawyers. We may well anticipate that any shortcomings of our courts will be exposed to public view. It therefore becomes the duty of our profession to see that there are no shortcomings. We may take comfort in the fact that such criticism as there is, is not directed at our substantive law, for, speaking generally, our substantive law is acceptable. The criticism of our courts goes chiefly to matters of organization (or rather lack of organization), to methods of selecting judicial personnel and to problems of procedure.

Fortunately for us, we do not have to spend anxious months preparing blue prints or experimenting with new and untried machinery. On matters of judicial management, we may turn to Dean Pound's *Organization of Courts* and we may look at the work of the Administrative Office of the United States Courts. For states troubled with the problems of an elective judiciary, Missouri has pointed the way to better days with its non-partisan court plan. On all vexing problems of procedure we have not only the example of the Federal Rules of Civil Procedure but also the invaluable reports and recommendations of the Section of Judicial Administration, approved by the Association in 1938 at Cleveland. These reports are the work of outstanding experts—judges, lawyers and professors of law—and they epitomize the best practice in the realm of judicial experience in the several states.

No, we have no lack either of blue prints or of ripe experience. The only questions are, do we see the problems that confront us, and have we the intelligence and courage to solve them in our respective communities? To put it more bluntly, in the field of judicial administration, for which we of the legal profession are primarily responsible, will we write ourselves down as Chamberlains and Hendersons or as Churchills and Dodds?

In our determination to preserve the American way of life, which in its essence means liberty under law and the greatest good to the greatest number, we are spending a still undetermined number of billions of dollars for national defense against enemies abroad. To put our own house in order insofar as our traditional courts and the newer administrative tribunals are concerned requires the expenditure of no money, or substantially none; all that is necessary is the interest, the intelligence, and the determination of the Bench and Bar.



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WALTER P. ARMSTRONG of Memphis, Tennessee, was nominated for President of the Association at the mid-winter meeting in Chicago. The nomination was made by the State Delegates, in accordance with Article VIII, Section 1 of the Constitution of the Association. The election of officers is regulated by Article VII of the Constitution and takes place at the annual meeting.

Mr. Armstrong has for many years been one of the most active and best known members of the Association. He was born at Pittsboro, Mississippi, October 26, 1884. He graduated from Yale College and from Yale Law School, *magna cum laude* where he was second in his class. He was admitted to the Tennessee Bar in 1908 and has practiced since then in Memphis. He is a member of the firm of Armstrong, McCadden, Allen, Broden & Goodman. He has been one of the editors of the *AMERICAN BAR ASSOCIATION JOURNAL* since 1934.

He has been President of the Memphis Bar Association (1932) and President of the Tennessee Bar Association (1936). He was a member of the General Council of the American Bar Association, 1929 to 1931; member of the Executive Committee, 1931 to 1934; member of the Budget Committee, 1931 to 1934; member of the House of Delegates since 1939; and Chairman, Committee on Jurisprudence and Law Reform, 1937 to 1941.

He was married in 1912 to Irma Waddell. He and Mrs. Armstrong have a son, Walter P., Jr., who is a senior at Harvard Law School.

GUY RICHARDS CRUMP was nominated for the office of Chairman of the House of Delegates at the Mid-Winter meeting in Chicago, in accordance with the provisions of the Constitution of the Association regulating elections. He was born in New London, Connecticut, April 4, 1886, and has resided in California since 1905. He was admitted to the California bar in 1907 and since then has engaged in the general practice of the law in Los Angeles. He is a member of the firm of Wood, Crump and Rogers. In 1925 Mr. Crump sat as judge of the Superior Court of Los Angeles County by gubernatorial appointment. For several years he was a member of the California Code Commission. He is a former president of the Integrated State Bar of California and a former president of the Los Angeles County Bar Association. He is a former member of the General Council of the American Bar Association. He has been state delegate from California since the new constitution of the Association was adopted in 1936. He assisted in drafting that constitution as a member of the committee appointed for that purpose by then President Ransom. He has been a member of the Committee on Rules and Calendar of the House of Delegates since 1936. If his election is confirmed at the annual meeting, as is generally expected, he will make an able chairman of the House of Delegates. His predecessor, Mr. Thomas B. Gay, the present chairman, has set a standard of ability and fairness that has been universally commended by members of the House of Delegates.

THE TENTH AMENDMENT RETIRES

By A. H. FELLER
Professor of Law, Yale Law School

ON FEBRUARY 3, 1941,¹ the Supreme Court brought to an end one of the most elusive and subtle doctrines of constitutional law—the doctrine of the independent vitality of the Tenth Amendment. Like the biographies of men, the life histories of doctrines are best written after death, and it seems opportune to jot down briefly the course of this little known chapter of constitutional history. The words of the Tenth Amendment are simple:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The words are perhaps too simple. They state the obvious—that the Federal government has those powers granted by the Constitution, while the states or the people have all other powers not prohibited by it. So obvious is the statement that sooner or later the thought must arise, why should such a provision be contained in a document so carefully drafted? Doesn't it have a deeper meaning not apparent on a mere reading of the words? At least four different meanings are conceivable:

Possible Meaning of Amendment

1. That the Tenth Amendment means what it says.
2. That it means that the Federal government can exercise only the expressly-granted powers and therefore cannot exercise any implied powers.
3. That it means that the Federal government cannot exercise an expressly-granted power if that exercise conflicts with one of the reserved powers of the states.
4. That the reservation "to the people" means that there are powers which neither the Federal government nor the states may exercise even though not expressly prohibited to one or the other.

The first requisite for determining the meaning of a constitutional provision is to find out what the framers thought it meant, and we now turn to the records of adoption.

The Adoption of the Amendment²

The seeds of the Amendment lie in the striking second Article of the Articles of Confederation:

"Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and Right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

These words were important in the Articles of Confederation; they set forth the essential philosophy of the system which was one of a central government of extremely limited powers existing by sufferance of the independent states. And the most important one of these words was the word "expressly."

As we all learned at school, the greatest objection to the ratification of the Constitution was its failure to

1. *United States v. Darby Lumber Co.*, 61 Sup. Ct. 451, 85 L. Ed. 395.

2. The best account of the legislative history of the Tenth Amendment is contained in the Government's brief in *Mulford v. Smith*, [1938], 307 U. S. 38. I have relied heavily on this account, with minor corrections and additions.

3. See John Adams in the Massachusetts convention, 2 *Elliot's Debates on the Federal Constitution*; Bloodworth of North Carolina, 4 *Elliot* 167.

provide a bill of rights. During the months of debate on the ratification, seven of the state conventions were busy on drafts to remedy this defect, and each of these drafts contained some provision to remove the doubts of those who feared that the new Constitution would enable the Federal Government to exercise greater powers than were granted it. What these doubts were, was made clear again and again in the state conventions—on the one hand that the Federal Government might exercise powers not granted³ and on the other hand that the states might not be able to exercise powers which had been granted to the Federal Government.⁴ The opposition to amendment (and some of it was raised by mighty voices, Madison,⁵ Randolph,⁶ Iredell,⁷ Pinckney⁸) was not based on disagreement in substance but on the contention that it was unnecessary, that the Constitution was a clear expression of intent to establish a federal government of limited powers. The provisions in the various state resolutions were finally proposed "in order (said John Adams) to remove the doubts and quiet the apprehensions of gentlemen."⁹

The wording of these state proposals is interesting. Two of the states, South Carolina and New York, contented themselves with declaring what they believed to be the proper rule of construction of the Constitution. "This Convention doth also declare," said the South Carolina Convention, "that no Section or paragraph of the said Constitution warrants a Construction that the states do not retain every power not expressly relinquished by them and vested in the General Government of the Union."¹⁰ Three others, Massachusetts, New Hampshire and North Carolina, called for an amendment. Said Massachusetts: "That it be explicitly declared that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several

4. So Grayson of Virginia "thought it questionable whether rights not given up were reserved for so extensive was the power of legislation, in his estimation, that he doubted whether, when it was once given up, anything was retained."

3 *Elliot* 449. Spencer of North Carolina: "I know it is said that what is not given up to the United States will be retained by the individual states. I know it ought to be so, and should be so understood; but, sir, it is not declared to be so." 4 *Elliot* 137. Patrick Henry: "It was expressly declared in our Confederation that every right was retained by the states, respectively which was not given up to the government of the United States. But there is no such thing here. You, therefore, by a natural and unavoidable implication, give up your rights to the general government." 3 *Elliot* 446.

5. 3 *Elliot* 620, 626.

6. 3 *Elliot* 464.

7. 4 *Elliot* 148-149.

8. 4 *Elliot* 315-316.

9. 2 *Elliot* 123.

10. "Formation of the United States," House Doc. No. 398, 69th Cong., 1st Sess., p. 1023. New York said: "that every Power, jurisdiction and right, which is not by the said Constitution clearly delegated to the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective state Governments to whom they may have granted the same; and that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater caution." *id.*, p. 1035.

states to be by them exercised.¹¹ Rhode Island set forth both its understanding of the Constitution and a proposed amendment expressing clearly the greater fear of loss of state power than of usurpation by the Federal Government.¹² Finally, Virginia, declared its understanding of proper construction and then called for two amendments, one directed towards the retention by the states of powers not granted:

"That each state in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Federal Government."¹³

And the other setting forth a rule of construction for the exercise of granted powers:

"That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution."¹⁴

Most significant was the use of the adjective "expressly" or "clearly" to qualify the powers of Congress in the proposals of all of the states, except Virginia and North Carolina.¹⁵ The word "expressly" is crucial, because when the Amendment was adopted by Congress for submission to the states it was deliberately omitted despite its inclusion in the proposals of the states. The Annals of Congress which record the early sessions are tantalizingly skimpy, but they do tell us this much—that two members of Congress moved to amend the proposed Amendment to reserve to the states powers not *expressly* delegated, and that these

11. See Citation, Note 10, p. 1018. *New Hampshire*: "That it be Explicitly declared that all Powers not expressly and particularly Delegated by the aforesaid Constitution are reserved to the several States to be, by them, Exercised." *id.*, 1025. *North Carolina*: That each state in the union shall, respectively, retain every power, jurisdiction and right, which is not by this constitution delegated to the Congress of the United States, or to the departments of the Federal Government." *id.*, 1047. It is to be noted that North Carolina refused to ratify the Constitution until amendments were adopted.

12. The declaration of Rhode Island said: "That the rights of the States respectively, to nominate and appoint all State Officers, and every other power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States or to the departments of government thereof, remain to the people of the several states, or their respective State governments to whom they may have granted the same; and that those clauses in the said constitution which declare that Congress should not have or exercise certain powers, do not imply, that Congress is entitled to any powers not given by the said constitution, but such clauses are to be construed as exceptions to certain specified powers, or as inserted merely for greater caution." See citation note 10, p. 1032. The proposed amendment: "The United States shall guarantee to each State its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this constitution expressly delegated to the United States." *id.*, 1056. It will be remembered that Rhode Island ratified the Constitution after it had already gone into effect.

13. See citation note 10, p. 1031.

14. See citation note 10, p. 1033. To complete the story mention should be made of Maryland which ratified without attaching amendments but whose convention addressed a statement to the electors recommending various amendments including the following: "That Congress shall exercise no power but what is expressly delegated by this Constitution." 2 *Elliot* 550.

15. "Expressly" was used by Massachusetts, South Carolina and Maryland; "expressly and particularly" by New Hampshire; "clearly" by New York. Rhode Island used "c'early" in one place and "expressly" in another.

motions were defeated.¹⁶ It was left for the Supreme Court one hundred and forty years later to amend the Amendment as the Congress had refused to do. The Annals also tell us what Madison, the proposer of the Amendment thought it meant:

"I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated should be reserved to the several states. Perhaps words, which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it."¹⁷

And a year later he was, if possible, even more explicit:

"Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States."¹⁸

The Amendment and the Court

The first important test of the Amendment¹⁹ was *McCulloch v. Maryland*. [1819].²⁰ If the Amendment were not merely declaratory, as Madison had said it was, if it had any independent operation at all, then it would deny to the Federal Government the exercise of the implied powers of Article I, Section 8. Luther Martin arguing for Maryland tried to use it in this way, but he seems to have been in some difficulty. After conceding that "the rule which the constitutional legislators themselves have prescribed in the 10th Amendment . . . is merely declaratory," he argued that the power of establishing corporations was reserved to states or to the people because it is not delegated to the United States. But in the same breath he gave the show away: "It [the power of establishing corporations] is not *expressly* delegated either as an end, or a means of national government."²¹ Thus it was demonstrated that the Amendment could not be used even as a means of limiting the implied powers without smuggling into the text what was not there—the word "expressly." Marshall, of course, made short work of this contention:

"Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people'; thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or

16. The amendment to insert "expressly" was first moved by Tucker. Madison objected "because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutia. He remembered the word 'expressly' had been moved in the convention of Virginia, by the opponents to the ratification, and, after full and fair discussion was given up by them, and the system allowed to retain its present form." 1 *Annals of Congress* 790. The proposal was defeated. It was then renewed by Gerry and was again defeated 32-17. 1 *id.*, 797.

17. 1 *Annals of Congress*, p. 457-458.

18. 2 *Annals* 1946-1947.

19. Earlier judicial consideration occurs in *United States v. The William*, Fed. Cas. No. 16,700 (1808) and in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 325 (1816).

20. 4 *Wheat.* 316.

21. *id.* at 372, 374.

prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this instrument had experienced the embarrassment resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments."²²

This would seem to be a complete answer and one would have expected the Amendment to lapse into its place as a mere declaration "for the purpose of quieting excessive jealousies." For the general run of Supreme Court decisions such was the consequence. Again and again the Supreme Court said, in effect "if the act is within the power confided to Congress, the Tenth Amendment, by its very terms has no application."²³ Yet, more than a hundred years after its adoption, the simple text of the Amendment was overwritten with two portentous doctrines—that the Amendment deliberately creates a vacuum of governmental powers between state and nation, and that it operates independently to limit the granted powers of the Federal government when they interfere with the reserved power of the states.

Perhaps it is exaggerating to speak of the first as a "doctrine;" its outright expression occurs just once in Supreme Court opinion, in *Kansas v. Colorado* [1907].²⁴ The government there advanced the notion that there were substantive powers which the Federal government could exercise, powers "inherent in sovereignty" even though neither granted or implied, if these powers were national in scope and beyond the powers of the States. The Court emphatically rejected the argument, relying first on the body of the Constitution and second on the Tenth Amendment. Whether the Court was correct in denying this bold contention need not concern us here, though it may be pointed out that the Court has since [1936] conceded the existence of inherent sovereign powers with respect to the conduct of foreign affairs,²⁵ and that the Government's contention has a considerable similarity to Story's doctrine of "resulting powers."²⁶ The use of the Tenth Amendment is the interesting fact. The Court said:

"The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted."²⁷

There is not the slightest warrant in the text or the legislative history of the Amendment for the view that the appendant and subordinate phrase "or to the people" stated the "principal purpose." Far from expressing the principal purpose, it is noteworthy that this phrase is contained in the submissions prior to the adoption of the Amendment of only two of the states, New York and Rhode Island; all the other state formulations referring only to reservation to the states.²⁸ Moreover the New York and Rhode Island formulations speak of a reservation "to the people of the several

states, or to their respective state governments to whom they may have granted the same," which throws some doubt on the firm conviction of the Court in *Kansas v. Colorado* that "the people" here means "the people of the United States." Nor were the words "or to the people" contained in Madison's original proposal to the Congress.²⁹ It may be that the phrase was thought necessary because the Constitution prohibits both the states and the Federal governments from doing a number of things. Thus neither can pass any *ex post facto* laws or bills of attainder or grant titles of nobility. Story thought that the phrase was meant to indicate the retention by the people of those undelegated powers which had not been vested in the state authorities by the constitution of the states.³⁰ Nowhere in the history of the adoption of the Amendment and nowhere in the Constitution itself is there any indication that some of the necessary powers of government are held in abeyance in the hands of the people desirous of keeping them from both state and nation. It is true as the Court says, that the purpose of the Amendment was not the distribution of power between the United States and the states. Such was not its purpose because that purpose had already been accomplished by the Constitution itself.

Of the various conceivable uses of the Amendment this is the most destructive of effective governmental power, for it establishes a rule of construction which deliberately fosters a vacuum between state and nation. No longer need the Court be assiduous to find that power resides somewhere; on the contrary the Court can rest comfortably in the assurance that the missing power is in the hands of the people who will amend the Constitution in due time.³¹ Here is the very antithesis of the cardinal principle laid down by the great Chief Justice that ours is "a constitution intended to endure for ages to come, and, consequently, to be adapted for the various crises of human affairs."³²

In practice, this construction of the Amendment has proven of lesser importance than the second doctrine mentioned above—that the Tenth Amendment operates independently to limit the granted powers of the Federal government when they interfere with or "involve" the reserved power of the states. The beginnings of the doctrine are apparent in *Collector v. Day* [1870],³³ but the Court's discussion of the Amendment is unclear and the ultimate decision seems to rest on an inherent limitation of the taxing power. It is *Hammer v. Dagenhart* [1917],³⁴ which first enunciates the principle in unmistakable terms. The Child Labor Law is held to be repugnant to the Constitution "in a twofold sense." It is not only a violation of the commerce clause "but

29. 1 *Annals* 453, 790. The phrase was added to the original proposal on the motion of Carroll, without debate. *id.* 790.

30. *Story on the Constitution*, §1907.

31. The contrary attitude is best expressed in Mr. Justice Cardozo's dissent in *Carter v. Carter Coal Co.*, 298 U. S. 238, 326 (1936): Prices in interstate transactions may not be regulated by the states. . . . They must therefore be subject to the power of the nation unless they are to be withdrawn altogether from governmental supervision. . . . If such a vacuum were permitted, many a public evil incidental to interstate transactions would be left without a remedy." Similarly, Mr. Justice Douglas in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 396 (1940): "There are limits on the powers of the states to act as respects these interstate industries. . . . But that does not mean that there is a no man's land between the state and federal domains."

32. *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819).

33. 11 *Wall.* 113.

34. 247 U. S. 251.

22. *id.* at 476.

23. *Everard Breweries v. Day*, 265 U. S. 545, 558. See also *Gordon v. United States*, 117 U. S. 697, 705 (1864); *Champion v. Ames*, 188 U. S. 321, 357 (1903); *Northern Securities Co. v. United States*, 193 U. S. 197, 344-345 (1904); *Hoke v. United States*, 227 U. S. 308, 320 (1913); *Missouri v. Holland*, 252 U. S. 416, 432 (1920); *United States v. Sprague*, 282 U. S. 716, 733 (1931).

24. 206 U. S. 46.

25. *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 318.

26. *Story on the Constitution* §1256.

27. 206 U. S. at 90.

28. See *supra* notes 10, et seq.

also exerts a power as to a purely local matter to which the federal authority does not extend."³⁵ How was this result achieved? Why, by amending the Amendment, just as Luther Martin had done in his argument in *McCulloch v. Maryland*, by inserting the word "expressly." "In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not *expressly* delegated to the National Government are reserved."³⁶

This Court seems never to have heard the caustic words which Story uttered a century before:³⁷

"This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. . . .

"It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect, as an abridgement of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted. . . . The attempts then which have been made from time to time to force upon this language an abridging or restrictive influence are utterly unfounded in any just rules of interpreting the words or the sense of the instrument. Stripped of the ingenious disguises in which they are clothed, they are neither more nor less than attempts to foist into the text the word 'expressly'; to qualify what is general, and obscure what is clear and defined. They make the sense of the passage bend to the wishes and prejudices of the interpreter, and employ criticism to support a theory, and not to guide it. One should suppose, if the history of the human mind did not furnish abundant proof to the contrary, that no reasonable man would contend for an interpretation founded neither in the letter nor in the spirit of an instrument."

The new doctrine slumbered fitfully in the books for nearly two decades, an aberration from settled constitutional construction, which once in a great while, as in *United States v. Linder* [1925],³⁸ would manifest itself as not dead, but asleep. In the strange and fateful October Term, 1935, it rose from its sleep, a giant with unparalleled powers for the destruction of legislative enactment.³⁹ To those who nourish the belief that the new doctrine was the creation of the conservative majority, it may come as a shock to realize that it was Mr. Justice Cardozo who brought it forth in *Hopkins Savings Association v. Cleary* [1935].⁴⁰ In question was the validity of a provision of the Federal Home Owners' Loan Act permitting state building and loan associations to be converted into federal associations in contravention of the laws of the state of creation. The answer to the question would seem to depend on whether such Federal action is "necessary and proper" to carry out the granted fiscal powers of the Federal Government. But there is only a passing reference to

35. *id.* at 276.

36. *id.* at 275.

37. *Story on the Constitution* §§1907-1908.

38. 268 U. S. 5, 17.

39. I deal here only with the cases in which the Tenth Amendment was used as the essential ground of invalidity. It must not be overlooked that in other cases of the period the Tenth Amendment enjoyed a vogue as a clincher to the demonstration that the statute was unconstitutional on other grounds. See *Schechter Corp. v. United States*, 295 U. S. 490 (1935); *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936); *United States v. Constantine*, 296 U. S. 287 (1935).

40. 296 U. S. 315.

this ground of decision.⁴¹ The provision is held invalid because of the Tenth Amendment. It is held to be "an invasion of the sovereignty or quasi-sovereignty of Wisconsin and an impairment of its public policy, which the state is privileged to redress as a suitor in the courts so long as the Tenth Amendment preserves a field of autonomy against federal encroachment."⁴² Established doctrine is not wholly ignored. Cardozo remembers the rule that the Amendment is not a limitation on the granted powers, and remembering he is forced to create a novel distinction—the Tenth Amendment is not a limitation where the federal power is exclusive, it is a limitation where the federal power is concurrent.

"The power of Congress in the premises, if there is any, being not exclusive, but at the most concurrent, and the untrammeled coexistence of federal and state associations being a conceded possibility, we are constrained to the holding that there has been an illegitimate encroachment by the government of the nation upon a domain of activity set apart by the Constitution as the province of the states."⁴³

Hard on the heels of this came *United States v. Butler* [1936].⁴⁴ Much ink has been lavished on that opinion, but it has not been sufficiently stressed that, its own individual defects of logic aside, it was not surprising in the atmosphere of thought induced by the *Hopkins* case. Important to recall is that there was no decision that the provisions of the statute were not within any of the granted powers. While the processing tax was held not to be a "true tax," it was said that this was not determinative of its validity. And as for the appropriation for benefit payments, the Court expressly refused to consider whether they were within the power to appropriate for the general welfare. Because, said the Court: "Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved powers of the states."⁴⁵

Note the progression. In the *Hopkins* case, Cardozo refers incidentally to the lack of Federal power in the premises, but places his emphasis on an independent operation of the Tenth Amendment where the Federal power is concurrent with that of the states. In the *Butler* case, Roberts refuses to decide whether the Federal power exists and strikes down the enactment by invoking the independent operation of the Amendment without reference to the new doctrine of limitations on concurrent powers. It only remained to extend the Amendment to strike down a granted exclusive federal power.

This was reserved for McReynolds in *Ashton v. Cameron County District* [1936].⁴⁶ The case involved the validity of the Municipal Bankruptcy Act, and, at the very outset the Court assumes for the purpose of discussion "that the enactment is adequately related to the general 'subject of bankruptcies.'"⁴⁷ How then can

41. "The destruction of associations established by a state is not an exercise of power reasonably necessary for the maintenance by the central government of other associations created by itself in furtherance of kindred ends." *id.* at 338-339.

42. *id.* at 337.

43. *id.*, at 338.

44. 297 U. S. 1.

45. *id.*, at 68.

46. 298 U. S. 513.

47. *id.*, at 527.

it be invalid? In this wise: If the Act is sustained, "the sovereignty of the state, so often declared necessary to the federal system, does not exist."⁴⁸ Here is high water mark. Indeed the tide of doctrine cannot go higher, for now nearly every exercise of expressly granted Federal power can be stricken down if the Court wills. Only where the states are expressly prohibited from acting can it be said that an exercise of Federal power will not interfere with their sovereignty.

The tide, as we all know, receded in a short time. Yet, it is noteworthy that its recession was gradual. Strange to contemplate is the hold which the doctrine of the independent operation of the Tenth Amendment had acquired over the members of the Court in so short a time. In case after case, the Court either ignored the Amendment⁴⁹ or declared the orthodox rule that "the sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government."⁵⁰ But at the same time, powerful minds on the Court could not rid themselves of the spell and found it necessary, after holding that particular enactments were within the Federal power, to go on to a consideration of the supposedly independent question of whether the enactment was also free of invalidity under the Tenth Amendment.⁵¹ Particularly striking in this connection are Cardozo's opinions on the validity of the Social Security Act. In the opinion on the old-age benefit provisions, a masterful and eloquent demonstration that the payments are within the power of Congress under the authorization of Article I, Section 8, to expend funds for the general welfare, is introduced by the statement that the scheme of benefits "is not in contravention of the Tenth Amendment."⁵² In the opinion on the unemployment compensation tax, he found it necessary, after proving convincingly that the tax was within the Federal taxing power, to devote many pages to the propositions that, "The excise is not void as involving the coercion of the states in contravention of the Tenth Amendment or of the restrictions implicit in our federal form of government," and that "The statute does not call for a surrender by the states of

48. *id.*, at 531.

49. The Tenth Amendment was pressed on the Court but was not considered by it in *Kentucky Whip & Collar Co. v. Ill. Cent. R. R. Co.*, 299 U. S. 334 (1937); *Labor Relation's Cases*, 301 U. S. 1 (1937); *Sonzinsky v. United States*, 300 U. S. 506 (1937); *Electric Bond & Share Co. v. S.E.C.*, 303 U. S. 419 (1938); *Mulford v. Smith*, 307 U. S. 38 (1939). Cf. *United States v. Bekins*, 304 U. S. 27 (1938).

50. *United States v. California*, 297 U. S. 175, 184 (1936). To the same effect, *Wright v. Union Central Ins. Co.*, 304 U. S. 502, 516 (1938): "In view of our decision that the law is within the bankruptcy power, scant reliance can be placed on the Tenth Amendment." Also, *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 330 (1936): "To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable."

51. So in *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 312 (1937), the Court, after upholding the validity of the exercise of Federal power, said, "The Tenth Amendment is without application, since the powers of the several states are not invaded or involved."

52. *Helvering v. Davis*, 301 U. S. 619, 640 (1937). The dissent by McReynolds and Butler was limited to the statement that "the provisions of the Act here challenged are repugnant to the Tenth Amendment."

powers essential to their quasi-sovereign existence."⁵³

It is to the great credit of the Department of Justice that it was astute to realize the dangers inherent in the lurking vitality of the doctrine. Again and again it pressed upon the Court, in the new municipal bankruptcy case, in the new A.A.A. case, in the wage and hour case, the unmistakable necessity of a clear repudiation of the rule. Finally, the Court heeded, and in *United States v. Darby* [Feb. 1941],⁵⁴ Mr. Justice Stone spoke out plainly for a unanimous court:

"Our conclusion is unaffected by the Tenth Amendment. . . . The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their granted powers. . . ."

"From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."

In tracing the history of the construction of a text, it is not unusual to find that men have read the text, not as written, but as they think it should have been written. Such, in brief, is the explanation of the doctrine whose birth and death we have just examined. Starting from the simple premise that the framers established a Federal government of limited powers, it has seemed to some that there must be a sharp, visible line between those powers and the powers of the states. Nowhere in the Constitution is such a line laid down in words. But, if one feels that the framers must have intended such a line it must be read into the Constitution somewhere, and what better place can be found than the Tenth Amendment, the only text which speaks of the distribution of powers among states, nation and people? The Amendment reads like a truism—the history of its adoption shows that it was intended to be a truism. Yet read in the light of a zealous desire to restrict the exercise of Federal power it became for a time an impenetrable barrier to effective governmental action. The result is not as surprising as the easy acceptance which the technique found among bench and bar. We had grown so accustomed to the cliché that the Constitution is what the judges say it is, that we had forgotten that the Constitution has its own voice. A century and a half of exposition and construction has not altogether deprived it of the power of clear and unmistakable speech. If we listen we can hear, if we read without the begrimed spectacles of preconception we can see. Now we know what we should have known all along—the Tenth Amendment means what it says.

53. *Steward Machine Co. v. Davis*, 301 U. S. 548, 585, 593 (1937). The three dissents are interesting. McReynolds, without specifically referring to the Tenth Amendment, thought the statute "unduly interferes with the orderly government of the State and otherwise offends the Federal Constitution." Sutherland found the tax and credit device to be within Federal power, but held that the administrative provisions of the Act "invade the governmental administrative powers of the several states reserved by the Tenth Amendment." Butler went further and said that "as applied to bring about and to gain control over state unemployment compensation, the statutory scheme is repugnant to the Tenth Amendment."

54. See Note 1.

LEADING ARTICLES IN CURRENT LEGAL PERIODICALS

BY KENNETH C. SEARS
Professor of Law, University of Chicago

CONSTITUTIONAL LAW

Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States, by David M. Levitan, in 35 Illinois L. Rev. 365. (December, 1940.)

The Constitution provides that the President "Shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." There is no mention of executive agreements. What is the distinction between them? There is the Bush-Bagot Agreement of 1817. This appears to be our first important executive agreement. This method of dealing with foreign affairs without the advice and consent of two-thirds of the Senators present has been in vogue ever since. But the method was less subject to public attention before October, 1929. At that time the State Department inaugurated the Separate Executive Agreement Series, and during the last decade more than one hundred executive agreements have been made simply by an exchange of notes. There was no exchange of ratifications as in the case of treaties. Some have distinguished agreements from treaties by asserting that executive agreements have only a morally binding effect and that only upon the administration that made them. The Attorney-General in his opinion on the destroyer deal expressed the idea that the deal could be consummated by an agreement because it involved no "commitments as to the future which would carry an obligation to exercise powers vested in the Congress." Somewhat different from this is Professor Wright's rule of limiting the use of executive agreements "to matters within the President's independent power of enforcement." "History refutes the contention that executive agreements are binding only on the administration entering into them." Whatever may be the difficulty of reconciling agreements with our constitutional law, executive agreements are valid under international law, and a repudiation of an agreement would be an international wrong. But there is disagreement whether such agreements are a part of the supreme law of the land.

INTERNATIONAL JUSTICE

The Nineteenth Year of the Permanent Court of International Justice, by Manley O. Hudson, in 35 American Journal of International Law 1. (January, 1941.)

"Events occurring during its nineteenth year created grave problems for the Permanent Court of International Justice, and the Court survived the year with uncertain prospects for the future." Thus writes our American judge. However, the attempt to carry on despite the war may give a surprise. The Court held a series of meetings at the Hague from February 19 to February 26, 1940. It made orders in the two cases on its docket. The meeting scheduled for May became impossible. The President and the Registrar, deprived of diplomatic privileges, in July established themselves provisionally in Switzerland. Neither the Assembly

nor the Council of the League of Nations met in 1940. Consequently, the general election of members of the Court, postponed in 1939, could not be held. The Supervisory Commission of the League of Nations met at Estoril in Portugal on September 28, 1940, and approved a budget for the Court for 1941. But the states contributing to the budget have greatly diminished in recent years and during 1940 the salaries of the judges fell into arrears.

LABOR RELATIONS

Freedom of Speech and the National Labor Relations Act, by Lewis H. Van Dusen, Jr., in 35 Illinois L. Rev. 409. (December, 1940.)

The Supreme Court of the United States in the Thornhill and Carlson cases protected freedom of expression by employees even though it was an incident of picketing that placed economic pressure on the employer. The NLRB Act prohibits an employer from interfering with, restraining, or coercing his employees in union matters. The Board, among other decisions, has interpreted this provision as forbidding expressions of opinions by an employer that employees should not join or remain in an union even though the expression was not accompanied by threats or economic pressure. The Board apparently has proceeded on the idea that the employees are not the economic equals of the employer. While the question to what extent the employer may express himself has not been decided by the Supreme Court, the trend of the decisions in the Circuit Courts of Appeals has been to overrule the decisions of the Board. Thus the question is, what expressions of an employer should be considered "coercing," etc., under Section 8(1)? Answer: (1) Statements accompanied by express threats; (2) Statements without threats but made in a setting that reasonably indicates to an employee that he must adopt the viewpoint expressed or else suffer discriminatory action in violation of the statute.

LEGAL BIOGRAPHY

John Singleton Copley, Lord Lyndhurst, by Sir William Holdsworth, in 50 Yale Law Journal 416. (January, 1941.)

Copley was born in Boston in 1772 but he was taken to England when the War of Independence started. There he was reared and lived until 1863 when he died in his ninety-second year. Three times he was Lord Chancellor and he was active in the House of Lords as late as 1861. This defense of him by way of further answer to Lord Campbell's "maliciously inaccurate biography" reviews Copley's life, his physical and mental characteristics, charges of political apostasy, his legislative career, and his judicial achievements. "In these qualities which made him a great statesman, a great Chancellor, and a great man, he has not been surpassed by any succeeding Lord Chancellor." Pleasant and interesting is this tribute by Sir William.

MUNICIPAL CORPORATIONS

Municipal Tort Liability in Operation, by Edgar Fuller and A. James Casner, in 54 Harvard L. Rev. 437. (January, 1941.)

Much legal literature previously published has discussed and criticized the rules concerning municipal tort liability. Fuller and Casner have summarized this material in a very satisfactory manner as a preface to a consideration of a research project on municipal tort liability in operation in Boston. Incidentally, consideration is given to similar projects in other cities, such as Chicago and Los Angeles. Why has the rule of immunity for municipal corporations maintained itself to such a large extent in view of the unfairness to the innocent victim and of the social desirability of spreading the loss? The answer is that there has been a general fear that fraud and excessive litigation would result in an unbearable cost to the public. To a certain extent this fear has a justification because the law of damages allows a recovery for pain, suffering, and "other intangible results of the tort." This makes for uncertainty, and this uncertainty leads to "long and expensive jury trials." By way of avoiding these results the authors advocate as their first legislative reform that a municipal corporation should not be compelled to compensate on this personal basis. On the contrary the injured plaintiff would be permitted to recover only the "monetary loss he has actually suffered." This limitation would not be applicable, however, to a suit against the officer or employee who committed the tort. The statistics gathered in Boston and other cities show that there is little, if any, justification for the fear of excessive cost and fraud. So, the first reform advocated seems to be suggested by excessive caution. The second legislative reform would abandon the distinction between governmental and corporate functions and substitute a rule of complete tort liability for partial tort liability. Thus it is hoped to eliminate an absurdity from the law.

PUBLIC LAW

The Story of Swift v. Tyson, by Alfred B. Teton, in 35 Illinois L. Rev. 519. (January, 1941.)

Swift v. Tyson was repudiated in Erie Railroad Company v. Tompkins but "a doctrine that seemed deathless in its life is proving restless in its death." Judge Story, who wrote the opinion in *Swift v. Tyson*, was a strong nationalist, a believer in a strong judiciary, and a proponent of codification. There is a theory that the rule of *Swift v. Tyson* was announced in 1842 without previous warning. Not true. The rule had been urged previously upon the Supreme Court and it had been accepted previously in several lower court cases. As early as 1812 Story set forth the doctrine of non-adherence to state decisions when he refused to follow a State statute. But the original limitations on the established doctrine were ignored and the rule of *Swift v. Tyson* was later extended beyond what Story had stated. Then came the reaction. All of the problems, however, have not been solved.

STATUTES

Legislative and Interpretive Regulations, by Frederic P. Lee, in 29 Georgetown L. Jour. 1. (October, 1940.)

With comprehensive explanation, the differences between substantive legislative regulations and substantive interpretive regulations are set forth and illustrated. (1) A legislative regulation occurs where non-conformance to the regulation is to be followed by the imposition of a legal sanction. If the regulation is enforced by no sanction, it is an interpretive regulation whether

the power to make the interpretation is conferred by statute or inheres in the Executive. There is a third category, "permissive definitions or standards." They neither interpret nor regulate under a sanction. However, neither Congress nor administrators always clearly observe these distinctions. (2) Legislative regulations "are invalid unless they fall within the metes and bounds of the power delegated." But here there is frequent confusion between ultra vires legislative regulations and erroneous interpretive regulations. (3) The power to prescribe interpretive regulations is not necessarily a delegated power. In order to administer a statute the responsible officer must first interpret. This process, if generalized, becomes an interpretive regulation. If it has long been adhered to it is likely to be accepted by the courts. Or it may be ratified by Congress. Until ratified, it may be changed and the new interpretation may be applied retroactively. (4) It is not clear whether ratification will prevent an administrator from changing his interpretation except that a recent decision prevented this from being done retroactively. Ratification of a legislative regulation should not prevent a subsequent change of it by the one to whom the legislative power has been delegated. Even a retroactive change of a legislative regulation should be possible unless due process has been denied or the delegated power has been exceeded. (5) Those affected take risks in relying on regulations whether they rely on incorrect interpretation or on ultra vires regulations. The legislative remedy is to follow the example of the Securities and Exchange Act and exempt from liability those who rely upon a regulation in good faith. (6) A regulatory statute may be expressed in such general terms that it will be unconstitutional because the standard of conduct is too indefinite. This difficulty may be avoided by providing that an administrator may make legislative regulations that are sufficiently definite and then apply the sanctions to the regulations.

LABOR

German Labor Trustees, by Harlow J. Heneman, in 10 Brooklyn L. Rev. 29. (October, 1940)—When the current war started, Germany was prepared industrially; Great Britain and France were not. What was it that Germany had done to solve its labor problem? Early in 1933, the National Socialist Party entered the government and disavowed the ideologies of liberal democracy and Marxian socialism. Labor struggles expressed in strikes and lockouts became unthinkable. In May, 1933, force was used to liquidate the labor unions and their assets were seized. The German Labor Front, including both employers and employees, came into existence. The Front is directed by a minister who operates through Labor Trustees. A code of "social honor" and Social Honor Courts were established. The Trustees exercise legislative, executive and judicial functions and have extensive power in the determination of wages, the settlement of disputes, and the trial of cases before the Social Honor Courts and the earlier established Labor Courts. "Collective agreements arrived at as the result of free bargaining between autonomous economic groups are a thing of the past." By a decree in June, 1938, the authority of the Labor Trustees was extended. They were empowered "to fix wages at higher or lower levels in branches of industry designated by the Minister of Labor, even though changes in shop ordinances and collective rules be necessary." After the war started, the control of the Trustees was extended again and a decree of December 6, 1939, "gave them the authority to punish summarily all persons violating their written orders."

AMERICAN BAR ASSOCIATION JOURNAL

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HOUSE OF DELEGATES

The Association's representative body held a truly notable mid-winter meeting in Chicago on March 17-18, devoted to the best interests of the public and the profession at a critical time. Delegates from every state gave stature and representative character to the deliberations.

The ascendant issues of course concerned the lawyers' part and place in the common tasks of National preparedness for defense. In a large number of useful but unobtrusive ways, the organized lawyers of America are making invaluable contributions in aid of the National effort. For this purpose they have been marshalled under the leadership of the American Bar Association and its dynamic Committee on National Defense.

Equally manifest in the House was a disposition to concentrate the attention and efforts of lawyers on measures which are related to the National emergency and are calculated to improve the functioning of government and to fortify and defend the rights of citizens to a continuance of impartial and law-governed justice as a part of the American tradition of freedom. A great grist of business was dispatched, but these timely issues were uppermost.

The high notes of the meetings were of leadership and determination, and not at all of despair or defeatism. There was no mood as of men, who, in Kipling's phrase, were watching "the things you gave your life to, broken, and stoop and build 'em up with worn-out tools." There were stirring evidences that the lawyers of America, far more than a majority of whom were represented in the meeting by delegates of their own choosing, are resolved to do in practical ways whatever is in their power to defend and protect to the uttermost the American constitutional system and the freedom of men and women in this hemisphere.

Such a meeting at such a time, in furtherance of such a program, is indeed a good omen

for all of those who, anywhere in the world, still hold fast to the ideals of liberty, justice, law, and human rights beyond invasion by one's own or any other government.

S. 674 IS BEST

The capacity of the House of Delegates for sound and sure-footed action was demonstrated anew in the decisions made as to legislation to improve administrative procedure and safeguard essential rights of justice according to law. Under the leadership of President Lashly, the House remained intent on taking such steps as would be cooperative and helpful in bringing about constructive results. It refused to go beyond the limits of practicalities as to objectives, but reiterated clearly and simply its steadfast adherence to stated fundamentals. There was the quality of statesmanship and moderation in its well-planned course.

Justly the House hailed the importance and public usefulness of the reports emanating from the Attorney-General's Committee on Administrative Procedure. These epoch-marking contributions to public and legislative consideration of the subject have been chronicled and made clear in the February and March issues of the JOURNAL. The House recognized that from sources in no way unfriendly to the administrative agencies, the way has been opened and the needed material has been made available for the early enactment of legislation for which the need is now admitted by all concerned.

Next the House adopted a careful statement of the principles and main provisions which public-minded lawyers believe should be embodied in an adequate and remedial bill. These should be read by every lawyer; they are printed in this issue. The House did not take its stand for particular origins, authorships, or forms of legislative provisions; it went to the substance of essential principles and remedies, and militantly urged their incorporation in legislation. The all-important objective was seen to be team-work for an adequate bill.

Having done all this, the House gave heed to the present legislative situation, by expressing definitively its opinion that, among the bills thus far drafted and introduced, the best as yet available is S. 674, prepared by the so-called "minority" members of the Attorney-General's Committee. That this bill can and will be further improved, as a result of legislative consideration of its comprehensive provisions, was implicit in the House action. Finally, the task of cooperating in the formulation and advocacy of an adequate bill was declared

to be an Association task of first importance, to which all possible aid should be given.

Wise leadership having planned and supported such a clear and forward-looking program, the vote of the House of Delegates was naturally unanimous for its adoption. There was no discord or diversity of opinion in staunchly approving and supporting the recommended course.

JUSTICE AND THE DEFENSE OF THE COUNTRY

It is with deep pride that we note the response of the legal profession to the call to national defense. Lawyers are serving everywhere in the Selective Service organization, on defense committees of bar associations, national, state, and local, and individually wherever they can be of use to their country. It seems to us a distinctively American thing that contributions to the public service are made by every man according to his own special skill, each helping where he can help most effectively. Thoughtful men of all nations have always risen to this idea, but it has been recognized with particular clearness in our own day.

A century and a half ago a young English theological student wrote privately, for his own guidance, a minute on "the lawfulness of bearing arms in defensive warfare." He afterwards rose to a place of towering importance in the great movement which placed the non-conformist conscience at the helm in the public life of England, but he never reasoned more clearly, or spoke more truly, than when he said to his own soul:

No man has such strong and forcible motives, as the real Christian, to abound in every good word and work, whether to his friends, his country, or his fellow-creatures in general. Acting from conscientious considerations, and taking into his enlarged estimate a view of the injury which threatens the cause of God, he has grounds of resistance on which none but he can stand, and inducements to fortitude which none but he can feel. His sources of consolation, too, are greatest in the time of trial; and he is best prepared for every event.

As for lawyers, we too can see our way clear. What is involved is Justice, and this is our very field of action. We can serve our country well by sustaining the mutual relations of citizens on a just and fair basis, with the least friction and ill-feeling.

Here [said the Greek poet] abides the Spirit of Law, and her sister Justice, sure foundation of States, and Peace, one at heart with them, stewards of wealth for men, golden daughters of Themis of good counsel.

The bar which we represent has not forgotten its duty.

PRESIDENT LASHLY'S LETTER

There is being sent to all members of the Association a letter from President Lashly, dated March 31, 1941, the opening and closing paragraphs of which are as follows:

"At the close of the fourth mid-year meeting of the House of Delegates, I take pleasure in writing to acquaint you in brief with some of the important business transacted and decisions made by the delegates acting for themselves, and in their representative capacity for the members who were not present in person."

* * *

"Manifestly it is not feasible for all of the members of the Association to attend meetings such as this, but it is the earnest desire of the Officers and the Board of Governors that the membership of the Association be made aware of the activities of its agents. This letter is devised as a special means of bringing these particular matters to your attention. A more comprehensive digest of the entire proceedings may be found in the April issue of the *AMERICAN BAR ASSOCIATION JOURNAL*. Should you have any views to express or constructive comments which you think ought to be brought to the attention of the official family of your Association, you must be very sure that you are at liberty to express yourself in any manner you may see fit, and that your views, opinions and wishes are important."

The letter is a splendid message from the President, as well as an excellent summary of the work of the House of Delegates. Since the the work of the House of Delegates. We desire to give it this special emphasis and consideration. Many members will wish to preserve the President's letter with the April *JOURNAL*.

ARTICLES IN THE JOURNAL

As it is the policy of the *JOURNAL* to provide, within practicable limits of space, a forum for the free expression of the views of members of the Association on matters of importance to the profession and the public, and as a wide range of opinion elicits a representative expression of the varying views, the Association and the Board of Editors of its *JOURNAL* assume no responsibility for the views stated in signed articles, beyond expressing by the fact of publication a judgment that the contents of the article merit consideration by our readers.

Editorially the *JOURNAL* supports the policies and objectives of the Association as from time to time duly determined. The views expressed are not necessarily those of each member of the Board of Editors.

THE BANKRUPTCY ACT OF 1938

THE TWO following articles present what may be called opposing philosophies as to how Bankruptcies are best handled by the courts. The first article by Mr. Henry Blum, a lawyer widely experienced in reorganization and insolvency matters, emphasizes the idea of the maximum amount of control during administration in bankruptcy of the creditors. The second

article, by Mr. Edmund Burke, Jr., of the legal department of the Securities and Exchange Commission stresses the idea of control during administration in bankruptcy, by the court having charge of the bankrupt estate. Taken together, the two articles may be said to bring down to date informed comment and criticism on our present Bankruptcy Act.—Ed.

THE CHANDLER ACT AND THE COURTS

BY HENRY S. BLUM
Of the Chicago Bar

THE first bankruptcy law of any extended life enacted by the Congress of the United States was the Bankruptcy Act of 1898. The other bankruptcy statutes which came into existence under the power to enact laws relating to bankruptcy given by the Federal Constitution to Congress were all short lived. These abortive efforts to create a national bankruptcy system in the United States in 1800, 1841 and 1867¹ and the reasons for their failure call for a story, the telling of which is no short matter. This is not the place for it.

For forty years the Federal Courts and our national economy struggled with the Bankruptcy Law of 1898.² It was under the fire of criticism almost from the date of its enactment. One group—large, important and organized, attempted repeatedly in the earlier days of the act to bring about its repeal. In greater volume came the rumbling and the roar of criticism directed to its administration. How much of the criticism was justified by defects in the law and its administration and how much of it would have been directed with almost equal violence against the most perfect administration of the most perfect bankruptcy law conceivable, it is not necessary here to consider.

It must be remembered that a bankruptcy court is

1. The Act of 1800 was repealed in 1803. The Act of 1841 was repealed in 1843. The act of 1867 was repealed in 1878. See Remington on Bankruptcy, Vol. 1, p. 14, et seq.

2. An index to the struggle may be found in the Amendments to the Act. These are as follows: (Unless otherwise noted, the Amendments relate to the original provisions of the law). Amendment of Feb. 5, 1903, June 15, 1906, June 25, 1910, March 2, 1917, January 7, 1922, May 27, 1926, February 11, 1932, March 3, 1933, Sec. 74—individual debtors composition and extension, Sec. 75—agricultural compositions and extensions, Sec. 77, railroad reorganizations, May 24, 1934—Sec. 80—municipal debt readjustment, June 7, 1934—Sec. 77B; June 28, 1934—Amendment to Sec. 75, May 15, 1935, Aug. 20, 1935—Amendment to Sec. 77B, Aug. 27, 1935—Revision of Sec. 77, Aug. 28, 1935—Sec. 75 re-enacted, Aug. 29, 1935—Amendment to Sec. 77B, April 10, 1936—Amendment to Sec. 79, April 11, 1936—Amendment to Sec. 80 (municipal debt readjustment), June 5, 1936, June 26, 1936—Amending Sec. 77, Aug. 12, 1937—Amends Sec. 77B, Aug. 16, 1937—adds Chapter X, covers public taxing agencies or instrumentalities, Aug. 25, 1937—prohibits agreements to fix fees, to Stat. at L 810, March 4, 1938—amends Sec. 75, June 22, 1938—The Chandler Act.

a place of commercial death and interment. If, in the lively language of the critics of the Bankruptcy Act, the estate of a bankruptcy in administration is carrion, it is an easy step, mentally, to characterize the lawyers and others participating in its administration as vultures. Underneath it all is the unexpressed hate of bankruptcy as a symbol of failure. A generous or even a fair judgment of a process that brings to the surface everything sordid in the parties to it and brings nothing in its conclusion except disappointment, would be unreasonable to expect.

In the forty year period of its life, ending with 1938, the concept of bankruptcy in the United States expanded tremendously. The original act created a court of bankruptcy which in its simplest terms afforded relief to the distressed debtor by discharging him from his debts and aided his creditors by distributing his property equitably among them.³

The Problems of the Depression

Then came the collapse of our Prosperity which, as we must now concede, was a jerry built structure supported by inflated credits, bad credits and dishonest credits. In the collapse there went into the tumbling ruin credits that would under normal conditions have proven honest and sound, but now went to increase the size and number of the nation's bankruptcies.

The problems presented by the collapse of 1929 were in many respects new to the lawyers and the courts. The credit devices on which the prosperity of the country were so largely built if not new in principle were certainly so in application. We had real estate mortgage bonds distributed through the length and breadth of the land and in foreign countries. To these were added issues of industrial bonds, public utility bonds, railroad bonds, preferred stocks, debentures and other credit and security devices, new and old. Our courts were filled with foreclosure proceedings and equity receiverships which appeared to go on interminably without apparent hope of conclusion. One obvious reason for this con-

3. *Louisville Joint Stock Land Bank vs. Radford*, 295 U. S. 555. *Continental Illinois National Bank and Trust Company v. Chicago, Rock Island and Pacific*, 294 U. S. 648.

gestion soon came to the surface. The army of lawyers collaborating on the incredibly verbose instruments which supported or evidenced these issues failed to provide, even within the limits permitted by law, for any effective means of dealing with dissenting and non-cooperating minority groups.

For all these the bankruptcy law of 1898 made no provision. The authors of that law could have had no conception of the problems presented by them. The assets involved in the default of these securities were of a character with which bankruptcy courts as previously constituted were not organized to deal. These were going businesses, large structures calling for continuous operation, such as hotels, apartment houses, office buildings, subdivision projects and golf clubs and a host of other properties and their involvements.

That there was great dissatisfaction with courts of equity in their attempted administration of these sick businesses and properties goes without saying. The cry was raised as insistently as ever that the vultures were feeding on the bodies of the dead. The clamor was heard in the halls of Congress and would not be denied.

In the retrospect we must again recognize that the clamor was the inevitable consequence of what had gone before. That there were vultures need not be denied. There was waste and worse in equity receiverships. But behind it all was the agonized resentment of the disappointed investor whose money was lost the day he bought his security, but whom nothing could have satisfied short of some procedure of magical potency that would have given value to something that had no value. The widow, the spinster, the old man and the minor child who looked to the income of these unsound securities for food, shelter and clothing would not have been easy to satisfy with anything that the most perfect law and the most perfect court could have done for them.

Section 77B Comes Into Being

The evil was there nevertheless and the need of a law to mend the evil became apparent to Congress in 1933. The concept of bankruptcy in the form recognized by the writers of the Bankruptcy Act of 1898 was expanded to give relief to every kind of entity owing money or having securities outstanding with respect to every kind of problem that could possibly arise. The new subjects for the ministration of the bankruptcy law as expanded by the amendments of 1933 and 1934 included farmers, railroads, corporations of every character and public bodies. The most widely known of these amendments and the most important dealing with corporate reorganizations was given the designation of Section 77-B.

The original bankruptcy law was in the main untouched by these amendments. Nothing in these appendages affected the subject of ordinary bankruptcy as dealt with in the original Act, even though they were, in their original form, a part of a program to re-write the entire law.⁴

Forty years of clamor, agitation and criticism brought in 1938 their legislative result. The bankruptcy act was laboriously re-written and in 1938 Congress enacted the revised law as the Chandler Act. The law as passed is a complete revision of the existing statute from its first chapter to its last, including the significant amendments of the last years of its life. It is a tremendous

legislative opus of six hundred eighty-six sections which, at least in its refinements, does credit to its long history and imposing group of sponsors.

If a multiplicity of cooks could ever be an assurance of a perfect broth, the Chandler Act should be legislative perfection. In the report of the Committee on the Judiciary of the 75th Congress there are listed by name the associations and individuals who helped in the writing of the law and, in general language, acknowledgment is made for the help of "law school professors, authors of law textbooks and others, all men schooled in bankruptcy law and procedure."⁵

That this large and assorted group of helpers brought to the task ripe scholarship and adequate technical skill is apparent from the examination of the non-controversial revisions of the Act. A multitude of wrinkles disappeared under the skillful efforts of this able and scholarly group. It must, however, be noted that the statute in its entirety tends to reflect the opinions of those who felt most strongly or advanced their views most positively on debated or debatable questions. The influence of the Securities and Exchange Commission on the reorganization sections and the consequences of the Commission's concept of a reorganization statute have given to Chapter X the character which provokes this discussion.

Chapter X

Chapter X of the Chandler Act was drawn to replace Section 77-B of the Bankruptcy Act of 1898 dealing with the subject of corporate reorganizations. The index to this new chapter must be found in the assertion that creditors cannot be trusted to protect their interests in a corporate reorganization nor to direct the administration of their property while it is in the courts. It goes further, and by express language, at least as interpreted by almost all of the District Courts of the United States, excludes them from any right to determine who shall manage their vital interests during the critical period of the pendency of the case in the Federal Courts. They have with respect to this administrative period in practical effect nothing to say about their property.

Whatever theoretical objections may be voiced against the foregoing conclusion based on language found in Chapter X or any non-judicial construction of it, it must be recorded that such, nevertheless, is the consequence of the view taken by United States District Courts with singular exceptions of the language of the Act. It must be acknowledged too that ample basis for this departure from the traditional forms of our jurisprudence is found not only in the language of the Act itself but also in the statements of the proponents of these provisions of Chapter X in Congress, prior to the enactment of the measure. The Chandler Committee sets out in its report at length the views of Commissioner (now associate Justice of the United States Supreme Court) William O. Douglas of the Securities and Exchange Commission. We shall take from the significant comments of Justice Douglas the little needed to give point to our story.⁶

With this system (of corporate reorganizations under the previous law) in operation, the courts could do very little. They could offer investors and creditors little protection. They were crippled by a reorganiza-

4. Section 77B was in its original form Section 76 of the Hastings-Michner Bill originally drafted under the direction of Solicitor General Thatcher, Senate Document No. 65, 72nd Congress, First Session.

5. Page 2, House of Representatives Report No. 1409, 75th Congress, First Session.

6. Page 38, House of Representatives Report No. 1409, 75th Congress, First Session.

tion system which was based upon the theory that reorganization was a procedure wherein the legal matters were left to the court; the business matters to the reorganizers. Obviously reorganization is not strictly a legal problem. It is a business and administrative matter of great complexity. And even though the courts wanted to exercise a broader conditioning influence over the whole process, they frequently were in no position to do so, since they did not have nor were they in a position to get the facts. The bill recognizes this weakness in the system. It makes it necessary for the courts to deal with the business and administrative problems of reorganization. It makes it possible for the courts to do so by giving them administrative and expert assistance. In that way it vitalizes the role of the courts. In a variety of ways, it brings the court into association with the facts of the business; it assures that the court will be fully informed; it places in the court power to give impetus to a reorganization—to see that a plan is drafted and that moves are made to get the support of investors; and it gives the court genuine power to see to it that the reorganized company is provided with good management and a sound capital structure. In the public eye, the courts already have the responsibility; what the courts need are ample powers commensurate with their actual or ostensible responsibility.

We observe then that reorganization is not strictly a business problem. The creditors who are to be the ultimate beneficiaries or conceivably the victims of the reorganization have, in Justice Douglas' view demonstrated a lack of qualification for the task of looking after their own affairs. It is too much for them. The reorganization, as Justice Douglas points out, is a business and administrative matter of great complexity. The answer to it all is to vitalize the role of the court. The court must see to it that the reorganized company is provided with good management and a sound capital structure.

Business Questions for the Courts

The legislative scheme outlined in the quoted statement turns on the implications found in the word "court." Attributes are assumed for the court without which the conclusions of Chapter X are without rational basis. Congress was being carried along a path that was new. The right of litigants to control the course of the action and the administration of the estate was restricted, if not denied, to a degree that has scant precedent in our laws. The compensation for this loss of rights was to be found in the functioning of a court capable of the vision, judgment and insight required by the eloquent formula of Justice Douglas.

If the judge of the court proves to be completely human; if he has whims and quirks; if he has friends in whom he places excessive confidence; if he has mental limitations which make it difficult for him to weigh and resolve the complex and difficult problems of management and administration with the clarity and accuracy presupposed in the act; in short, if the statute places on the Federal Judge burdens and responsibilities no man should be asked to bear, the result must be deep dissatisfaction—and worse.

Let us take a little closer look at the way the law operates. A large, distressed property finds its way into the Federal Court for reorganization under the provisions of Chapter X. Both its assets and its liabilities, we will assume, total more than a million dollars. At the threshold of the proceedings is the need for a trustee to operate the huge business, a "disinterested trustee." This trustee is to be chosen by the court. In almost universal practice he will be chosen without any

consultation with the creditors whose interests are involved. The statute as construed by the courts appears to require that procedure. (Sec. 156, Chapter X, Bankruptcy Act of 1938.)

The Court's Trustee

The trustee following his appointment has complete responsibility for the management of the business. He may, of course, avail himself of the help of some or all of the persons he finds present in the operating company which is placed in his charge by the court. This to a greater or less extent the trustee usually does. There is no obligation on him to do so. He is responsible to no one except the court. If he proves to be competent, diligent, far-seeing and shrewd, the creditors are fortunate. If he proves to be incompetent, wilful, destructive and not completely alive to his responsibilities, the creditors are unfortunate—but helpless.

The arrangement is in complete disregard of the known frailties of humankind. Choice of management for an important business venture is under all circumstances a difficult assignment. Competent and thoroughly qualified managers are not easy to find. There is competition for executive brains in all branches of industry. Thoroughly qualified persons are usually already employed. Yet we must again emphasize if the choice of trustee is a bad one, the result may be disastrous to those interested.

A generalization may be submitted as to all of us. We tend to have confidence in our friends. We also tend to like our friends. If the presiding judge of the United States District Court who has before him the problem of appointing a trustee views the matter of the appointment as one calling for a person in whom he has the utmost confidence, to whom should he turn except a person he has known long enough to have earned his friendship and confidence? If, on the other hand, the appointment is viewed, as well it could be, as an opportunity for profitable employment, again to whom should he turn but someone he knows and likes? Should it be a matter of surprise to find that in practice the appointment to the responsible and hence lucrative positions of trustees of large and important business units should so often have gone to persons who by reason of their relations to the Judges of the District Court may be said to enjoy their friendship, respect and confidence.

The Chandler Act was an infant but a few months out of the Congressional delivery room when the murmurings against this aspect of it became audible. If Chapter X did no more than confirm a dubious practice in vogue under Section 77B, it drew attention to what was now viewed as a growing evil.

The most dramatic expression of this criticism was found in a statement by Attorney General (now Justice) Frank Murphy. The widespread practice indulged in by Judges of the United States District Court in the appointment of their friends as receivers and trustees in Bankruptcy came into question publicly. The ugly word "patronage" came to the surface.

Clearly the Attorney General did no more than give voice to the half suppressed and barely audible grumbling among creditors and their representatives that runs back to administrations under Section 77-B. From the first day when the principle of "disinterested trustees" began to be applied under the provisions of 77-B of the predecessor act, gossip, very often wicked and baseless, slowly enveloped so many of the Federal Judges as to amount to a haze thrown over a large part of the Federal Bench.

Attorney General's Challenge

The statement of the United States Attorney General attracted wide attention. The attention was justified not only because it came from the ranking law enforcing officer of the United States, but also because of the widespread belief in the earnestness and sincerity of the speaker. There might be added to this the reason previously suggested, namely, that the United States Attorney General (now an Associate Justice of the Supreme Court of the United States) was doing little more than making vocal the generalization indulged in by those who were disposed to criticize the practice.

As was to be expected, the newspapers of the country took up the Attorney General's statement and expanded on it. For a period the subject was eagerly followed by a large section of the press. Important editorial comments, which started from the assumption that the practice among Judges of the District Court of the United States of using the power of appointment in bankruptcy as distributors of patronage was general, proceeded from this assumption with ringing calls to do something about it. The man on the street reading the comments was prone to draw even more sinister implications from what was said.⁷

At least one distinguished member of the Bar rushed to the defense of the Judges in the public press. The cause of the Federal Judges was taken up vigorously by the bar and in public statements they were absolved of all blame for the conditions discussed by the Attorney General as well as the editorial writers. However well intended this all was, it would be difficult to say which was worse—the attack or the defense. The mischief of it was, that for the first time in the history of the United States the propriety of the conduct of a large part of the federal judiciary was debated in the public press.

The sequel to the Attorney General's statement and the agitation that followed it was the organization of a committee under the chairmanship of Robert H. Jackson, then Solicitor General and now Attorney General of the United States.⁸ The statement by which the committee was called into being and its duties outlined directs attention to the fee system under which Referees, Receivers and Trustees were operating and suggested a system of permanent officials compensated on a salary basis by the government instead of by fees which come out of the estate.

Whatever may come out of the committee's efforts, it may be pointed out that the abolition of the fee system in bankruptcy is not a new thought. No subject was more thoroughly canvassed by the persons and organizations called into the work by Lloyd K. Garrison, who as special assistant to Thomas D. Thatcher, Solicitor General of the United States, had the laboring oar under President Hoover's Message of February 29, 1932. The draft of the first bill revising the Bankruptcy Act submitted to the President by Mr. Thatcher, called for an amendment to Section 40 abolishing the fee system as to referees. Before and since the fee system came under critical consideration by organizations interested in the subject and by Congress. No practical answer has heretofore come from these deliberations.

In this view of the matter it would be unreasonable to expect greater results from the present study of the fee system than came from those of the past. This is

particularly true as to the subject under consideration.

To attract persons qualified by ability and experience to assignments as trustees of important distressed properties the compensation must at all times be determined by the financial importance of the particular case and the other elements that enter normally into the fixing of compensation of persons rendering similar service.

Creditor Control Democratic

The answer to the problem may be the abandonment of the philosophy of Chapter X of the Chandler Act construed as to its administration by the District Judges, as herein stated. This abandonment may appear all the more difficult as the provisions of the statute are deeply rooted in the history of creditor control of bankruptcy administration. That there is abundant basis for the conclusion that credit control of administrations in bankruptcy has not been satisfactory may be found elsewhere than in Justice Douglas' eloquent summary of it. The challenge of the wisdom of Chapter X in its administration rests upon the knowledge that creditor control with all that has been said against it is a democratic process consistent both with our social philosophy and our form of jurisprudence. Chapter X has unhealthy and subversive implications that should be ended with all speed.

The Chandler Committee in its report of July 20, 1937, goes back to the Donovan report of December 5, 1931 and the scandals in the Southern District of New York in 1929 to justify the revision found in the Chandler Act.

Of all the contradictions found in the Chandler Act there is none greater than this—that the evil provisions of the Bankruptcy Act of 1898 which brought about the call for a revision were left intact in the Act of 1938. The provision under which lawyers could assemble claims of creditors for the filing of a petition in bankruptcy is substantially unchanged. The procedure from that point forward to the election of a trustee is the same as in previous acts. Creditor control of ordinary bankruptcy which was in 1929, according to the Donovan report, the basis for ambulance chasing by lawyers, is as complete as it ever was. A majority in number and amount of creditors in ordinary bankruptcy still elect the trustee. Creditor control in ordinary bankruptcy was, if anything, slightly expanded. Provision is made in the statute for the election of a committee of creditors with powers of supervision over the administration of an ordinary bankruptcy.

We see then that if the evils spoken of in the Donovan report existed to the extent and in the form implied in the report of the Chandler Committee, they are still present in the Bankruptcy Law of 1938. But bankruptcies coming under this part of the law are quite generally, and have always been, small money. Sordid as some of the condemned practices in ordinary bankruptcy may have been, the importance of them, even as dramatized by the Donovan report, must be acknowledged to be minor.⁹

Ordinary bankruptcy, particularly since the enact-

8. Department of Justice Circular released May 19, 1940.

9. In the Report to the President on the Bankruptcy Act and its administration (p. 7, Doc. 65, 72nd Congress, 1st session), it is disclosed on a check-up of the Clerk's records of all the cases closed in the fiscal year ending June 30, 1930—cases which originated for the most part before the depression—65.44 per cent had no assets above exemptions and 82.24 per cent had assets of less than \$500.00.

7. See Laird Bell's letter to the Chicago Daily News, May 19, 1940.

ment of Section 77-B and the companion statutes of 1934, and Chapter X and the companion sections of the Chandler Act, receives as a rule the husks of businesses squeezed dry by financial pressure and to be liquidated on the auction block. Distressed units of any size need to take refuge and generally do, at least in the first instance, in the more dignified and hopeful provisions of the portions of the bankruptcy law dealing with the subject of reorganization. It is in this division of the law that creditors and for that matter stockholders were plucked by the Chandler Act of their right to participate in the choice of the person who could spell out the life and death of their interests. The responsibility for the administration of the debtor's property lies now wholly between the trustee's own conscience and the conscience of the Judge who appointed him.

Burdens of the Disinterested Trustee

The trustee appointed in these proceedings, who, by the language of the Act, must be "disinterested," is more than the administrator and the executive head of the business for which he is appointed. Here is a brief summary of what is expected of him.¹⁰

The trustee is charged with the duty to investigate the acts, conduct, property, financial condition, desirability of operation of the business, and any other relevant matter and report thereon to the court. . . . These functions of the independent trustee appointed in the larger cases are difficult to overemphasize. In the first place, the trustee is required to assemble the salient facts necessary for a determination of the fairness and equity of a plan of reorganization. He assembles the necessary ingredients, so to speak, of a plan. For the first time such information will be available to the court and the investors as a routine matter. On the basis of such information, the court and the investors can intelligently decide whether or not proposed plans are fair, equitable, and sound—whether assets are being wasted or overlooked; whether there is a complete accounting for the old venture before the new one is launched; whether the old management should be restored to power; whether the allocation of assets, earnings, and control are fair. Through an impartial trustee, such facts will be assembled and appraised. Only through some such method can the court be in a position to exercise an informed judgment and to afford a critical scrutiny and supervision of the estate at all times.

The arrangements so smoothly described by Mr. Chandler's committee is a complete denial of the validity of our experiences with human nature. One truth of universal application is this—that every task should have its taskmaster. If the taskmaster cannot be personalized, he must be found in circumstances that will bring home retribution for mistakes made on the given job. It is the fear of consequences which makes for efficiency in decision and performance. If there can be no untoward consequences to the man on the job there is no fear.

When the trustee has the ear of the court and that fact is known, all criticism of him tends to hush. It will appear to the parties in interest, that it is *not* politic to question the qualifications, to say nothing of the

motives of the man who sits, so to speak, at the right hand of the presiding judge. The impression may be contrary to the facts. Searching criticism may be, if forthcoming, welcome to the court. It will rarely be forthcoming. The atmosphere of the case will not be conducive to it.

These provisions of Chapter X of the Chandler Act are more than mere innovations on our laws. They are precedents in judicial absolutism, the corrosive effects of which are beyond prediction.

It may be that creditors and other parties to a reorganization proceedings under Chapter X are as incapable of looking after their interests as Justice Douglas indicated. The judges of the United States District Court may know what is good for the beneficiaries of the reorganization so much better than the beneficiaries themselves as to justify the power given to the United States District Judges by this Chapter. A large dissenting opinion can be found to this assertion among bankers, lawyers and some of the District Judges themselves.

If all the assertions as to the failure of creditor control of reorganizations be accepted as fully justified, the answer is still not to be found in the wet-nursing by the District Judge of the interest of incompetent, uninformed and undiligent parties to the action.

It is to be noted that the evils resulting from the improper functioning of democratic processes tend to check themselves whereas the evils resulting from the intrenchment of bureaucratic power tend to perpetuate themselves. If minority security holders in reorganization proceedings are unfairly and iniquitously dealt with by a controlling group or a majority, somewhere somehow retribution tends to come. New and better forms of trust indentures designed to safeguard interests of minorities will have to be devised to make new securities acceptable to the public. Banks and financial houses overreached in the past by persons in position of advantage will watch future credits to prevent a repetition of such occurrences. With all of its blundering and shortcomings, the democratic process is a living thing that tends to grow and evolve. Only absolutism is death.

Above all these things rises the need for protecting the judges of the United States District Court from gossip and slander. In the long history of American politics the one institution standing alone in its immunity from the questioning of its conduct has been the Federal Judiciary. This may be attributed not only to the security of tenure enjoyed by appointees to the Federal bench, but also to the character of men attracted to these judicial posts. The prevailing faith in our federal judicial system forms a large part of the basis of our confidence in the established order. Nothing should be permitted to weaken that faith.

The ultimate solution of our problem may be in the revision of the appropriate chapters and sections of the Chandler Act. In the meantime, the United States courts through their rule-making power can do much towards sharing the responsibility for the performance of the burdensome duties imposed on the court by the Chandler Act with the creditors and other persons in interest who may become affected by the conduct of the court.

10. Page 43, House of Representatives Report No. 1409, 75th Congress, First Session.

The Chandler Act And The Courts; A Reply*

BY EDMUND BURKE, JR.

Director, Reorganization Division, Securities and Exchange Commission

THE issues, as stated by Mr. Blum, are simple: "creditor control" *versus* "court control"; "democracy" *versus* "judicial absolutism." With the issues so drawn, Mr. Blum unhesitatingly votes for democracy, as would all of us. But such simplicity is possible only in a vacuum. More specific issues are necessary if the discussion is to have any meaning.

It therefore becomes necessary to ascertain whether the alternative proposed by Mr. Blum—i.e., the status quo ante Chandler Act¹—in fact represented control by *creditors*; whether democracy is furthered or retarded by the provisions of the Chandler Act; and whether the degree of court control provided by the Chandler Act is such as to constitute "judicial absolutism." Most important, it is both appropriate and desirable to find out, if we can, just how the provisions of Chapter X have actually worked in the two and one-half years of their operation. This Mr. Blum has failed to do, or even to attempt.

The burden of his charge is that Chapter X of the Chandler Act is based upon the theory that creditors cannot be trusted to protect their interests in a corporate reorganization nor to direct the administration of their property while it is in the courts. More specifically, he is disturbed by the provisions of section 156 of that chapter, which requires that, upon the approval of a petition, the judge shall appoint one or more disinterested trustees if the indebtedness of the debtor is \$250,000 or more. What appears to concern him most is the provision of section 189 under which the trustees are charged with the duty of operating the business and managing the property of the debtor. His thesis is that it is hard to get good operators; that judges tend to appoint as trustees persons who enjoy their friendship, respect and confidence; that if the choice of a disinterested trustee is a bad one, the results will be disastrous, but, rightly or wrongly, the parties in interest will rarely have the courage to complain; and that, even if the choices are generally good, there have been and will be "murmurings," "gossip" and "slander" from those who are disposed to criticize the practice.

As a matter of fact, Mr. Blum's arguments are curiously reminiscent of those which were unsuccessfully

*The views expressed in this article are those of the writer only, and do not necessarily represent the views of the Securities and Exchange Commission.

1. The Hon. Walter Chandler was at the time Chairman of the Sub-committee on Bankruptcy of the Committee on the Judiciary of the House of Representatives; he is now Mayor of the City of Memphis, Tennessee, and Chairman of this Association's Municipal Law Section.

2. On debatable issues, Mr. Blum believes, the Chandler Act in its entirety tends to reflect the opinions of those who felt most strongly or advanced their views most positively. More specifically, he states that Chapter X reflects the opinions of the Securities and Exchange Commission. The implication is that, when Chapter X was under consideration, the representatives of the Securities and Exchange Commission talked just a little louder and a little longer than anyone else. While those who recall the hearings on Chapter X before the committees of the Senate and the House of Representatives may have reason to doubt the accuracy of this implication, it cannot be denied that the Commission did support most of the improvements embodied in Chapter X. That being the case, it is not surprising, when the propriety of particular provisions of Chapter X is questioned, for a member of the staff of the Com-

mission at the time Chapter X was under consideration by the Congress.² Except for a passing reference to a statement made by the then Attorney General³ only seven months after Chapter X became fully effective, the entire argument could as easily have been made in April, 1937, when the Chandler Act started down the legislative path which led to its enactment fourteen months later.

The arguments advanced at that time in support of the disinterested trustee requirement have nowhere been better stated than in an article by Mr. Justice (then SEC Commissioner) Douglas which appeared in this JOURNAL in November, 1938. Those arguments need not be repeated here. It will be more fruitful to discuss the actual operation of the Chapter since that date.

Before we turn to that inquiry, it is to be noted in the passing that we do not entirely disagree with Mr. Blum. Thus, we agree that passage of the Chandler Act was at least facilitated by what Mr. Blum calls the agonized resentment of investors. We may even concede that that resentment was in part attributable to a sort of neurosis,—or as Mr. Blum suggests, to a hatred of bankruptcy as a symbol of failure—which disabled investors from arriving at a fair judgment of the bankruptcy process. But in seeking to rectify that injustice we must of course avoid going to the other extreme of overlooking defects in the former procedure. It is only fair to state that Mr. Blum does not himself fall into this error. There is, he agrees, abundant basis for the conclusion that creditor control of administrations in bankruptcy has not been satisfactory. In other words, while he believes that the particular reforms embodied in the Chandler Act would not have been enacted had it not been for the uninformed resentment of investors, he is willing to admit that the former practice left much to be desired. Presumably, then, his conclusions represent his choice of the lesser of what he considers two evils.

Let us examine, then, the actual record of two and one-half years' experience under Chapter X, to see whether experience has shown his fears to be unfounded. We may reserve for later consideration the arguments of a more ideological nature. Fortunately,

mission's Reorganization Division to be called upon to present the other side of the case.

3. Address of Attorney General (now Mr. Justice) Murphy before the annual luncheon meeting of the Associated Press on April 24, 1939, as reported in the New York Times for April 25, 1939, page 17. This address followed by only twelve days the public announcement of the appointment of the Attorney General's Committee on Bankruptcy Administration, which was charged with the duty of making a study of the operation of the law governing referees in bankruptcy, trustees in bankruptcy, and receivers appointed by the Federal courts. The committee's study and its report thereon, which was transmitted to the Chief Justice of the United States on January 7, 1941, was confined to "straight" bankruptcy proceedings, and it seems not unlikely that a similar limitation must be read into the references in the address in question to "referees and receivers and their attorneys." Contemporaneous editorial comment indicates that, even as applied to "straight" bankruptcy proceedings, there was a very substantial dissent from the views expressed. See, e.g., New York Herald Tribune, April 25, 1939, p. 18. In any event, the remarks cannot have been intended to apply to proceedings under Chapter X, which had become fully effective on September 22, 1938, only seven months before.

as we have pointed out, it is no longer necessary to decide the issue on the basis of theoretical arguments alone. As of February 28, 1941, the Securities and Exchange Commission had filed its notice of appearance⁴ in 99 Chapter X proceedings involving 116 companies with an aggregate indebtedness of \$626,000,000,⁵ as compared with a total indebtedness of \$954,000,000 for all Chapter X proceedings instituted during the period.⁶ These 99 proceedings are distributed among 44 of the 85 district courts, so through its reorganization staffs in eight field offices the Commission has been in a favorable position to observe the disinterested trustee requirement in actual operation.

Disinterested trustees were appointed in 84 of the 99 Chapter X cases in which the Commission has filed its notice of appearance.⁷ In 49 of these 84 cases, however, there was continuity of management either because the property was being operated under a management contract,⁸ or because an officer of the debtor was appointed as an additional trustee to share the responsibility of operating the business and managing the property⁹ or was retained in the employ of the trustee.¹⁰ While it is difficult to obtain precise information on the point, creditors are known to have been consulted in connection with the appointment of about 20% of the 84 disinterested trustees who served in Chapter X proceedings in which the Commission has appeared. In only about 25% of the cases in which an officer of the debtor was appointed as additional trustee or manager was this done at the instance of creditors.

Our study of the actual results of operations under Chapter X trusteeships has necessarily been confined to 69 cases, since operating figures are not available for the remaining 15 proceedings. From that study it appears that, where the disinterested trustee was alone responsible for operating the business, results were substantially better in 40% of the cases, and worse in none. Curiously enough, the record is not quite as good in

4. Under section 208, the Commission must file its notice of appearance in a Chapter X proceeding if requested by the judge, and may do so upon its own initiative if the judge approves. Once the Commission's notice of appearance is filed in a proceeding, section 208 provides that it is to be deemed a party in interest, with a right to be heard on all matters arising in the proceeding.

5. Only 226 of the 870 companies which were the subject of Chapter X proceedings instituted between September 22, 1938 and February 28, 1941 had an indebtedness of \$250,000 or more. In the absence of special circumstances, the Commission will not ordinarily seek to file its notice of appearance in a proceeding unless there is a substantial public investor interest in the debtor.

In addition to the Chapter X proceedings, the Commission had, as of February 28, 1941, filed its notice of appearance in 67 proceedings (involving 89 companies with an aggregate indebtedness of \$733,000,000) which were originally instituted under Section 77B, the judge having deemed it practicable to apply the provisions of section 208. See Section 276.c.(2). Fifteen of the Section 77B proceedings and 31 of the Chapter X proceedings had been disposed of prior to February 28, 1941.

6. Excluding the proceedings for the reorganization of Associated Gas & Electric Company and its subsidiary, Associated Gas & Electric Corporation, the figures for total indebtedness would be \$222,000,000 and \$550,000,000, respectively.

7. Seventy-five of these cases involved an indebtedness of \$250,000 or more, so the appointment of a disinterested trustee was mandatory under section 156. In the discretion of the court, disinterested trustees were also appointed in 9 of the smaller cases. In addition, trustees who appear to have been disinterested were appointed in 34 of the 67 proceedings which were originally instituted under Section 77B.

8. This was the situation in 10 cases.

9. As authorized by section 156. This was done in 16 cases.

10. As authorized by section 191. This was done in 23 additional cases.

cases in which the disinterested trustee was not solely responsible for operations.¹¹ Lumping cases of both types together, we find that operating results under the trusteeship were substantially better in 30% of the cases, about the same in 67%, and not as good in only 3%. No substantial difference was noted between cases in which creditors played a part in the appointment of the disinterested or operating trustee or manager and those in which they did not.

Obviously, factors other than the competence of the trustees may have affected the operating results in these cases. And it may be said that the record of two and one-half years' experience with sixty-nine cases does not afford an adequate basis for a definite conclusion. But it is considerably better than nothing. In any event, most assuredly, the figures set forth above furnish scant support for the proposition that operations under Chapter X trustees are notably inefficient. On the contrary, numerous cases can be cited in which Chapter X trustees did a very efficient job indeed. In the McKesson & Robbins case, for example, consolidated net income¹² was increased from \$3,197,000 in 1938, before the trusteeship, to \$5,471,000 in 1940, under the disinterested trustee. Proportionately as good results were achieved in many of the smaller cases, through the reduction of operating expenses, the elimination of duplication, the abandonment of losing lines of business, the sale of unproductive property, and other means.

The case for the disinterested trustee need not be rested upon his operating results alone, however. As Mr. Blum points out, the disinterested trustee has a number of important duties in addition to that of operating the debtor's business. Perhaps the most important of these is the duty, imposed by section 167(5), of preparing and submitting to the court and to creditors and stockholders a report of his investigation of the property, liabilities and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof. Thus, as pointed out in the report of Mr. Chandler's committee, such information was for the first time made available to the court and the investors as a routine matter and at a comparatively early stage in the proceedings.¹³ In a number of cases, the trustee's investigation led to the discovery and prosecution of causes of action which resulted in substantial recoveries or settlements.¹⁴ The trustee is also under statutory pressure to prepare and file a plan within a time fixed by the court, or a report of his reasons why a plan cannot be effected. In a number of cases, this requirement materially expedited the proceed-

11. The percentages are: better—23%; about the same—72%; worse—5%.

12. Before interest, amortization and income taxes. The proceeding is pending in the United States District Court for the Southern District of New York.

13. Reference may be made to the extremely informative reports rendered by the disinterested trustee in McKesson & Robbins, Inc., and Reynolds Investing Company, among others. The Reynolds Investing case is pending in the United States District Court for the District of New Jersey.

14. E.g., Case "A," in which the trustee's discovery and prosecution of causes of action against directors, officers, accountants and others have already produced settlements aggregating nearly \$1,000,000 in cash and marketable securities.

Case "B," in which the trustee's discovery and prosecution of causes of action against the sole stockholder and affiliated interests resulted in a settlement the effect of which was to increase the equity for a bond issue of nearly \$1,000,000 from a negative quantity to a figure approaching its face amount.

Case "C," in which the trustee's discovery and prosecution of causes of action resulted in the recovery of property and securities valued at more than \$250,000.

ings through literally forcing the parties to direct their attention to the formulation of a plan, thus eliminating the delays occasioned by interminable disputes between warring factions. In others, the trustee's report led to an early liquidation of properties which were in a hopeless condition, instead of permitting the proceedings to drag along until the remaining assets were consumed by continuing losses. Surely functions of the character mentioned in this paragraph are not to be entrusted to a representative of only *one* of the "litigants."

So much, in broad outline, for what the Chapter X trustees have actually accomplished. In spite of this record, or more probably in ignorance of it, the mere existence in the Federal courts of the power to appoint the trustees has resulted, Mr. Blum believes, in an undercurrent of criticism and suspicion directed at our federal bench—an undercurrent because the parties in interest rarely have the courage to complain to the judge. Human nature being what it is, it is probably futile to suggest that if only the necessary courage existed, the occasion (if any) for its exercise might soon disappear.¹⁵ Of course no statute can instill in a man the courage of his convictions. Still less is it possible to legislate into a man the courage of his mere suspicions. This reticence, if it exists, is perhaps symptomatic of a tendency to overemphasize tactics and strategy. If that tendency persists, we may well become a nation of amateur psychologists, forsaking the traditional American forthrightness for ready made techniques of winning friends and influencing people.

Be that as it may, it is not altogether clear whether or not Mr. Blum thinks this criticism and suspicion is justified. From his remarks at one point, we would be warranted in concluding that he would be pleasantly surprised to find that "patronage" did not play a large part in the appointment of Chapter X trustees. Such an attitude on his part would evidence a lack of confidence in our federal bench which apparently is not shared by this Association's Special Committee on Administrative Procedure.¹⁶ At another point, however, Mr. Blum points to the need of protecting our judges from "gossip" and "slander." From this it may be inferred that he believes that the criticisms and suspicions are unjustified. In any event, he thinks the ultimate solution may be the revision of the Chandler Act. A better solution might be to stop repeating mere suspicions without first examining the record to see whether they have any foundation in fact. If they are not justified, it may be questioned whether he is not doing the federal bench a disservice by even repeating them. On this point Mr. Blum's argument comes to this: We must repeal the disinterested trustee requirement in order to protect our federal bench from unjustified criticism. That is indeed a novel excuse for repealing or amending a statute.

At this juncture, we would do well to see how the parties in interest have actually felt about the trustees

15. There is much to be said for the view that if the parties to a proceeding (whether in court or before an administrative body) would only voice their criticisms in open hearing, they would frequently find, as Mr. Blum suggests, that their criticisms were welcome.

16. The Special Committee is stated (87 Cong. Record, 1184) to have prepared S. 918, which was introduced in the Senate on February 19, 1941, by Senator Hatch. Section 708 of that bill provides that in controversies pending before an administrative tribunal involving any person, the hearing shall be held before an examiner appointed by the United States district judge in the district in which such person resides or has his principal place of business, unless a hearing in the District of Columbia is found to be in the public interest.

who were appointed in the Chapter X cases in which the Commission has participated. Very little criticism of the trustees' operations has come to the attention of our regional office staffs, and in their opinion, about half of what little criticism there has been may properly be attributed to the fact that, on particular issues, a party's reactions are naturally to some extent colored by whether the trustee's position happens to accord with his own. In only 10 of the 84 Chapter X cases were there any "murmurings" even at the time the trustees were appointed, and in at least four of these cases they clearly arose out of factional disputes among the parties in interest themselves. It is exceedingly unlikely that any such criticisms could have been made without coming to our ears, for though the parties in interest may rarely have the courage to complain to the judge, as Mr. Blum believes, they have exhibited no such reserve in their day-to-day discussions with members of our field office staffs, even where their views were not in accord with ours. At the outset, the participation of the Commission in reorganization proceedings may have been received with a certain amount of wariness on the part of both bench and bar. With the realization that the Commission has no axe to grind, however,¹⁷ there has developed a pretty general acceptance on the part of both judges¹⁸ and lawyers of the idea that the Commission has exercised its functions in a common sense and practical way and with effective results.¹⁹ As a consequence of this change of attitude, and our frequent informal contacts with parties and their counsel, we have been in a favorable position to learn what they really think. As we have said, our experience indicates that there has not been nearly as much dissatisfaction as Mr. Blum believes.

It remains only to consider whether the provisions of Chapter X in fact substitute "court control" for "creditor control," and "judicial absolutism" for "democracy." At the outset it should be noted that Mr. Blum is never clear on a very important point. As the Supreme Court recognized in the *United States Realty* case,²⁰ Chapter X (as distinguished from Chapter XI) prescribes a procedure which is peculiarly appropriate for the reorganization of corporations in which there is a *public* investor interest. In such cases the "creditor" class is likely to consist largely of hundreds of small bondholders scattered far and wide, who will rarely have been organized at the time the petition is approved and the disinterested trustee is appointed. At that stage of the proceedings there will be comparatively few actual creditors on the scene, and perhaps only a few individuals who have merely the hope that, through the solicitation of powers of attorney, they will at some future time represent a substantial number of creditors. Are these few entitled to speak for the entire creditor class? Under these circumstances, can it properly be said that the issue is court control *versus* "creditor" control?

17. The Commission's functions are purely advisory. It has no right to appeal nor to receive compensation for its services.

18. In 85 of the cases in which the Commission has appeared, its notice of appearance was filed at the request of the court. In the other 81 cases, the Commission's notice of appearance was filed upon its own motion, with the approval of the court.

19. This is evidenced by numerous commendatory comments and letters in our files. See Gerdes, "Recent Developments in Corporate Reorganization under the Bankruptcy Act," 26 Va. L. Rev. 999 (1940).

20. *Securities and Exchange Commission v. United States Realty and Improvement Company*, 310 U. S. 434, 84 L. ed. 1297, 60 Sup. Ct. 1044 (1940).

Chapter X affords every possible encouragement to creditor participation. Section 206 guarantees to the debtor, the indenture trustees and any creditor or stockholder, the right to be heard on all matters arising in the proceeding. Under Section 77B, the right to be heard was practically synonymous with intervention, a privilege which was sparingly conferred. This right to be heard extends, of course, to the hearing which, under section 161, must be held not less than thirty days nor more than sixty days after the approval of the petition. At that hearing, or upon application at any other time, the judge may hear objections to the retention in office of a trustee upon the ground that he is not qualified or not disinterested.²¹ Creditors and stockholders may submit to the trustee suggestions for the formulation of a plan, or proposals in the form of plans, and must be notified of their right to do so.²² Notice of the hearing on any plan must be given to them,²³ and they have the right to be heard upon any plan filed by the trustee, to make objections thereto, or to propose amendments or plans of their own.²⁴ In determining whether or not to accept any plan which is submitted to them, they will have the benefit of the trustee's report of his investigation, and of the opinion of the judge and the advisory report of the Securities and Exchange Commission, if such opinion and advisory report have been filed.²⁵ Finally, they are of course entitled to be heard at the hearing on confirmation of the plan under section 179, and upon hearings on applications for the allowance of fees and reimbursement of expenditures.

If these privileges are not exercised, which Mr. Blum assumes is the case, "court control" is certainly not the reason for it. Our experience has been that creditors and stockholders have neither abused the right to be heard nor disregarded it entirely, contrary to the somewhat inconsistent fears which were expressed at the hearings on the Chandler Act. Individual creditors and stockholders, or groups of them, have frequently advanced constructive suggestions with regard to the operation of the business and the form of reorganization plans, and not infrequently those suggestions have been adopted.

In the face of these provisions, can it be said that Chapter X substitutes court control for control by creditors and stockholders, or that it constitutes a step in the direction of judicial absolutism? The most that can be said is that it frees the court itself from the practical control of inside groups and self constituted committees which flourished under Section 77B.

As one of our most distinguished citizens observed in another connection not so long ago, the campaign is now over. In the case of the Chandler Act, the campaign was over in June, 1938. The time is past for "argument by slogan," in which the fruits of victory are confidently expected by the side with the liveliest imagination. Of course it is fun, in discussing the merits of a new piece of legislation, to let one's self go, unhampered by whatever limitations might be imposed by the text of the act itself, or by actual experience thereunder. But the recent remarks²⁶ of the Hon. Justin Miller, of the Circuit Court of Appeals for the District of Columbia, are just as apposite in discussions of

this sort as they are in the argument of appeals at law:

"If we could only stipulate with counsel that we take judicial notice of all these arguments, [i.e. arguments about 'star chamber procedure,' the 'dictatorship of the bureaucracy' and the 'passing of the rule of law'], it would save us an occasional earache and save counsel much time for oral argument."

The really important thing in such discussions, as a former President of the American Bar Association suggested some time ago,²⁷ is that both sides have the ability to "think (and to argue) without perspiring," or at least, we may add, without both sides perspiring at the same time. Stated another way, what all of the participants need is the ability to produce light without heat; a willingness to talk things through in an effort to find out just what the facts are.

At the present time, as we have said, we are, fortunately, not in the position of having to make a *guess* as to the possible or probable consequences of a *proposed* piece of legislation. The Chandler Act is already on the books, and has been for more than two and one-half years. The best possible basis for appraising its provisions is a study of how they have worked out in actual practice, and on that basis we do not believe that Mr. Blum has proved his case. If the record does not warrant dismissal of his indictment against the disinterested trustee, at the very least it surely justifies the Scotch verdict of "not proven."

27. Beardsley, "War and the Administration of Justice," 25 A. B. A. J. 919, 921 (1939).

Nomination of Officers

THE State Delegates attending the mid-year meeting in Chicago, in accordance with the provisions of the Constitution, nominated officers of the Association for the year 1941-1942, and also members of the Board of Governors to succeed those members whose terms will expire at the close of the Indianapolis meeting. The following nominations have been certified by the Secretary:

For President of the Association, Walter P. Armstrong, Memphis, Tennessee

For Chairman of the House of Delegates, Guy Richards Crump, Los Angeles, California

For Secretary, Harry S. Knight, Sunbury, Pennsylvania

For Treasurer, John H. Voorhees, Sioux Falls, South Dakota

Members of the Board of Governors:

First Circuit: Frank W. Grinnell, Boston, Massachusetts (to fill the vacancy caused by the death of George R. Grant of Boston)

Fourth Circuit: Willis Smith, Raleigh, North Carolina

Seventh Circuit: Morris B. Mitchell, Minneapolis, Minnesota

Eighth Circuit: Floyd E. Thompson, Chicago, Illinois

Election of officers of the Association and members of the Board of Governors, nominated by the State Delegates or nominated by petition, as provided in Article VIII, Section 2 of the Constitution, will be held at the meeting of the House of Delegates at Indianapolis the week of September 29, 1941.

Pictures and biographical sketches of Messrs. Armstrong and Crump appear in this issue.

The May issue will carry information about the other candidates nominated.

21. See section 162.

22. See section 167(6).

23. See section 171.

24. See section 169.

25. See section 175.

26. "A Judge Looks at Judicial Review of Administrative Determinations," 26 A. B. A. J. 5, 66 (1940).

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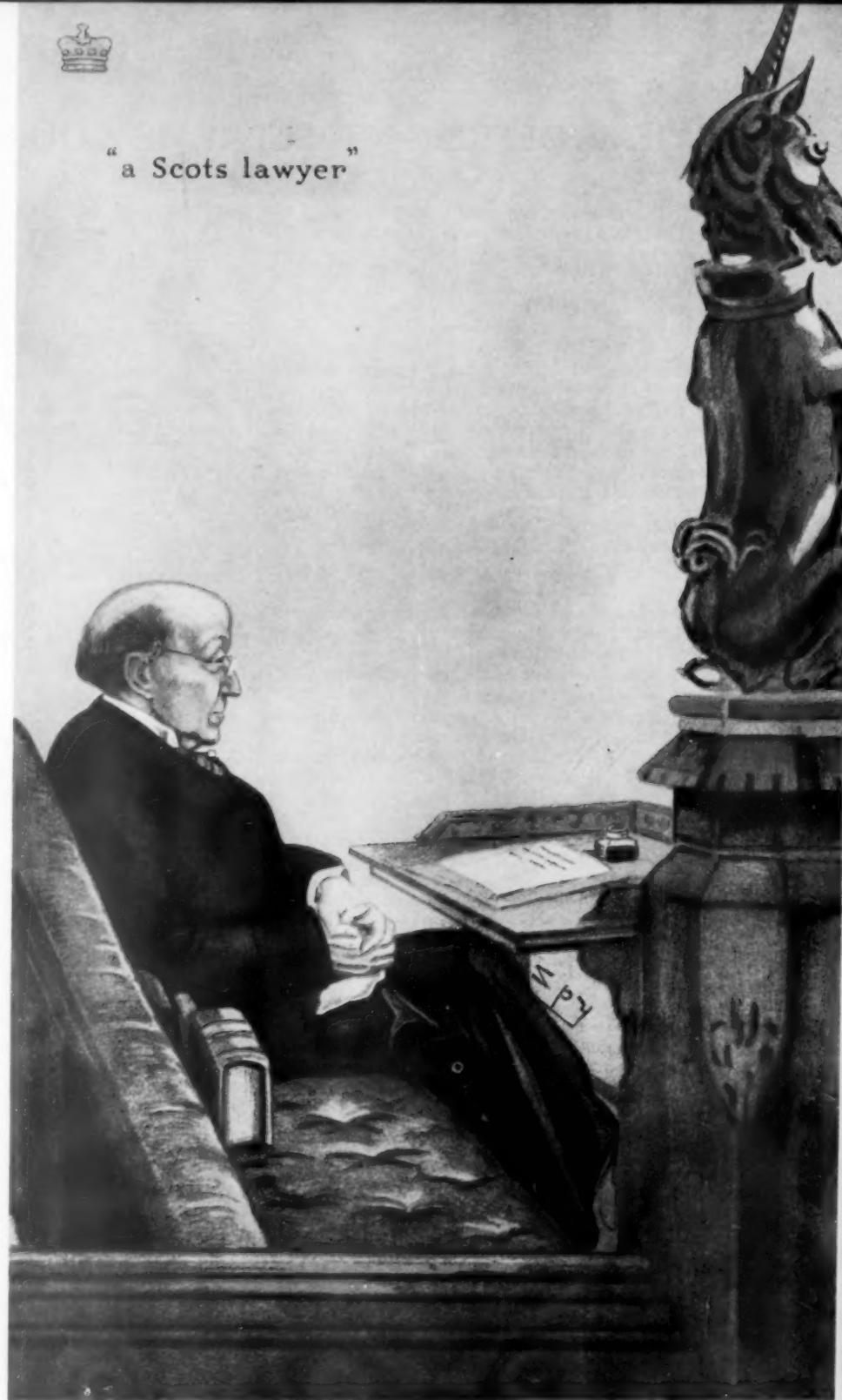
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*DIVERSITIES
OF THE LAW*

II



CARTOON BY "SPY"
From *Vanity Fair*
London—July 23, 1903

REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

Monopolies and Combinations in Restraint of Trade

The practices of members of a combination of women's garments designers and manufacturers, through the instrumentality of Fashion Originators' Guild of America, of boycotting systematically all retailers who sell copies of garments designed by members, are found by the Federal Trade Commission to be unfair methods of competition, tending to monopoly. The Commission's order to the combination to cease and desist from its practices is sustained, on the ground that the combination and its practices violate the Sherman and Clayton Acts.

Fashion Originators' Guild of America v. Federal Trade Commission, 85 Adv. Op. 557; 61 Sup. Ct. Rep. 703, U. S. Law Week, 4229 (No. 537, decided March 3, 1941).

This opinion considers the validity of an order of the Federal Trade Commission ordering the petitioners to cease and desist from certain practices done in combination which it found constitute unfair methods of competition tending to monopoly.

Some members of the combination design, manufacture, sell and distribute women's garments, chiefly dresses. Others are engaged in the manufacture and preparation of textiles from which the garments are made. The Fashion Originators' Guild of America is the instrumentality through which the petitioners accomplish the purposes condemned by the Commission. The chief object which the combination sought to accomplish was the elimination of "style piracy"—which is the copying of original styles or designs by competitors of members of the combination.

The method of accomplishing this was a systematic boycotting of retailers who sell garments copied by other manufacturers.

The Commission's order was sustained by the Circuit Court of Appeals, and on certiorari by the Supreme Court in an opinion by MR. JUSTICE BLACK.

Because the combination substantially lessens and hinders competition, it is found to be violative of Paragraph 3 of the Clayton Act. In this connection the opinion says:

The relevance of this section of the Clayton Act to petitioners' scheme is shown by the fact that the scheme is bottomed upon a system of sale under which (1) textiles shall be sold to garment manufacturers only upon the condition and understanding that the buyers will not use or deal in textiles which are copied from the designs of textile manufacturing Guild members; (2) garment manufacturers shall sell to retailers only upon the condition and understanding that the retailers shall not use or deal in such copied designs. And the Federal Trade Commission concluded in the language of the Clayton Act that these understandings substantially lessened competition and tended to create a monopoly. We hold that the Commission, upon adequate and unchallenged findings, correctly concluded that this practice constituted an unfair method of competition.

The combination is found contrary to the Sherman Act also. As to the illegality of the combination under that Act, MR. JUSTICE BLACK states:

Not only does the plan in the respects above discussed

thus conflict with the principles of the Clayton Act; the findings of the Commission bring petitioners' combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself. Section 1 of that Act makes illegal every contract, combination or conspiracy in restraint of trade or commerce among the several states; Section 2 makes illegal every combination or conspiracy which monopolizes or attempts to monopolize any part of that trade or commerce. Under the Sherman Act "competition not combination, should be the law of trade." . . . And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy; . . . subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott; . . . takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs; . . . and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs. . . . In addition to all this, the combination is in reality an extra-governmental agency, which prescribed rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the Statute."

The petitioners' argument that the systematic copying of the designs is tortious and hence justifies the combination is rejected.

Millinery Creators' Guild, Inc., v. Federal Trade Commission, (No. 251 decided the same day, upholds a like order of the Commission respecting a similar combination in the millinery trade. MR. JUSTICE BLACK delivered the opinion here also.

Case No. 537 was argued by Charles B. Rugg for the petitioner and by Mr. Solicitor General Biddle for the Commission.

Case No. 251 was argued by Mr. Lowell M. Birrell for the petitioners and Mr. Solicitor General Biddle for respondent.

National Labor Relations Act—Authority of Board to Restrain Unfair Labor Practices

Under the National Labor Relations Act, a finding by the Board of one unfair labor practice does not justify an order to cease and desist from all unfair labor practices condemned by the Act, unless the others enjoined bear some resemblance to the one found to exist or are to be anticipated from the employer's past conduct.

National Labor Relations Board v. Express Publishing Co., 85 Adv. Op. 614; 61 Sup. Ct. Rep. 693, U. S. Law Week, 4240 (No. —, decided March 3, 1941).

In this case the Court passed on the validity and scope of an order of the National Labor Relations Board ordering the respondent (1) to cease and desist from refusing to bargain collectively with the San Antonio Newspaper Guild; and (2) to cease and desist from interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, and other rights guaranteed by Section 7 of the National Labor Relations Act; and (3) to post notices stating

*Assisted by JAMES L. HOMIRE and LELAND L. TOLMAN.

that it will cease and desist as aforesaid, and bargain collectively with the organized representative of its employees. Its order also included a provision directing that any agreement, if reached, with the employees should be written and signed.

The Circuit Court of Appeals modified the order by striking from it all provisions except those directing the respondent to bargain with the Guild on request and to embody any understanding in a signed agreement.

On certiorari, the Supreme Court, in an opinion by MR. JUSTICE STONE, reversed the judgment under review, but reduced the scope of the order by limiting it to require respondent to cease and desist from interfering with the collective bargaining of the Guild, rather than from engaging in all unfair practices defined in the Act.

The opinion of the Court states that there is no statutory warrant for an order commanding obedience to every provision of the statute, when only disobedience to one is found. As to this and to the proper limitation of an injunctive order to the wrongful acts complained of, the opinion observes:

We cannot find such authority or requirement in the carefully chosen language of Section 10(c), which directs the Board to state its findings of fact showing the unfair labor practice charged and to order the person accused to "cease and desist from such unfair labor practice," or in Section 10(e) of the Act which authorizes the court on application of the Board to enter a "decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct. . . .

We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is no more onerous or embarrassing to the Board than to a court. And since we are in a field where subtleties of conduct may play no small part, it is appropriate to add that an order of the Board, like the injunction of a court, is not to be evaded by indirections or formal observances which in fact defy it. After an order to bargain collectively in good faith, for example, discriminatory discharge of union members may so affect the bargaining process as to establish a violation of the order.

MR. JUSTICE DOUGLAS delivered a dissenting opinion, expressing the view that the Board's order should be enforced in full.

MR. JUSTICE BLACK and MR. JUSTICE REED concurred in the dissent.

The case was argued by Mr. Laurence A. Knapp for petitioner, and by Mr. LeRoy G. Denman for the respondent.

Estate Tax—Status of Income from Decedent's Estate Received During Year After Death

Where an executor of a decedent's estate avails himself of the option to value the gross estate as of one year after the decedent's death, rents, dividends and interest received during that year are not to be added to the gross estate in determining the value thereof, under Section 302(j) of the Revenue Act of 1926 as added by Section 202(a) of the Revenue Act of 1935.

Maass v. Higgins, 85 Adv. Op. 590; 61 Sup. Ct. Rep. 631, U. S. Law Week, 4231 (No. 274, decided March 3, 1941).

In this opinion the Court disposed of three cases involving a question under section 302(j) of the Revenue Act of 1926, as added by Section 202(a) of the Revenue Act of 1935. The question was whether, when an executor avails himself of the option extended by the estate tax law to value the decedent's gross estate as of one year after the decedent's death, rents, dividends, and interest received during the year are to be added to the value of the property from which they are derived and included in the gross estate.

The Court, in an opinion by MR. JUSTICE ROBERTS, holds that they are not to be so included. After reviewing the contentions of the parties, MR. JUSTICE ROBERTS sets forth the view of the Court as follows:

It is not denied that, in common understanding, rents, interest, and dividends are income. Under the revenue acts, if such items are collected by a decedent's estate, the executors are bound to return them and pay tax upon them as income. In the case of a living holder, such receipts are never treated as on account of principal. Nor does the promise to pay interest, rents, or dividends either to a living owner of the asset or to his executor after death, which has not been legally separated from the asset of which it is an incident, have any market value apart from the asset, or bear any invariable relation to the value of the capital asset.

It is true that a bond embodies two promises, one to pay the principal at maturity, the other to pay interest at intervals until maturity. And the promise to pay interest or rent, or the expectancy of dividends upon stock, the amount of such payments, the past and prospective regularity of the payments, and other elements bearing upon the expectation of the receipt of income affect the value of any income producing property. But these elements are not separately valued in appraising the worth of the asset at any given time. It is the uniform practice to value the asset as an entirety, taking into consideration all the elements that go to give it value in the market.

In the appraisal of a decedent's estate, rent or interest accrued to the date of death is properly treated as a capital asset. So also, on the sale of an interest bearing security, it is the uniform practice to add to the value of the obligation, as such, accrued interest to the date of sale. Since the statute says that, at the option of the executor, a bond may be valued as of one year subsequent to the decedent's death, the natural conclusion is that the usual method of valuation shall be pursued whichever date is selected. The method always adopted for valuation at death is the same used in fixing a sale price; that is, to take the market value of the bond and add accrued interest to the date of transfer, at the rate stipulated in the instrument. It is not believed that Congress, in providing for two dates of valuation, intended that a different method should be followed if one date were chosen rather than the other.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissented.

The cases were argued by Mr. Homer S. Cummings for the petitioners, and by Mr. Richard H. Demuth for respondent.

**Corporate Reorganizations—Priority of Creditors—
Claims of Parent Company in Relation
to Creditors of Subsidiary**

Self-serving agreements imposed by a parent corporation on its subsidiary in violation of the parent's fiduciary duties will not be given effect against creditors of the subsidiary to protect stockholders of the parent.

Creditors having a separate lien on different properties all subject to unified operation are entitled to fair treatment on the basis of the value of the property subject to their respective liens. If there are no separate earnings records for the properties subject to different liens, a formula must be devised for at least an approximate ascertainment of the value of their respective assets.

In determining value, earning capacity is the essential criterion rather than values based on physical factors without regard to earning capacity.

Consolidated Rock Products Co. v. du Bois, 85 Adv. Op. 603; 61 Sup. Ct. Rep. 675; U. S. Law Week, 4216 (No. 400, decided March 3, 1941).

The proceedings here reviewed were under Section 77(B) of the Bankruptcy Act, involving a parent company, Consolidated Rock Products Co., and its two subsidiary companies, Union Rock Co. and Consumers Rock and Gravel Co. All the stock of the subsidiaries was owned by Consolidated, but each had outstanding mortgage bonds secured by liens on their respective properties.

A Plan of Reorganization approved by the district court called for the formation of a new corporation to take over all the assets of the three companies free from all claims.

The Plan gave the subsidiaries' bondholders 50% in income bonds and 50% in preferred stock for the principal amount of the old bonds. But it allowed nothing for interest accrued and unpaid. Consolidated old preferred stockholders were given two new shares of common (\$2.00 par value). The old common stockholders of Consolidated were given an option to buy new common (\$2.00 par value) for each 5 shares of old common at \$1.00 per share.

The control of the new company would vest in the old preferred stockholders of Consolidated, but would shift to the new preferred held by the old bondholders, in the event of specified defaults.

The Plan provided for the extinguishing of the old bonds of Union and Consumers held by Consolidated and for the cancellation of inter-company claims. Most important of the latter was one for over \$5,000,000 asserted by the subsidiaries as owing from Consolidated.

On unsatisfactory evidence the district court found that the value of the three companies, exclusive of going concern value and good will, exceeded the bonded debt, plus accrued and unpaid interest.

The district court also found that the present fair value of the assets was admittedly subject to the trust indentures of Union and Consumers and was insufficient to pay the face amount, plus accrued interest, of their bond issues. Nevertheless, that Court found it to be physically impossible to determine and segregate the properties which originally belonged to the companies separately; that unified operation had resulted in a commingling of the properties without any way of determining the part belonging to the several companies separately; and that, as a consequence, an appraisal would be so indefinite and unsatisfactory as to produce further confusion.

The Circuit Court of Appeals reversed. The Su-

preme Court affirmed the judgment of the Circuit Court of Appeals in an opinion by Mr. JUSTICE DOUGLAS.

The opinion first points out that there was no sufficient valuation data to enable the Court to determine whether the Plan was fair or not. An analysis of this phase of the problem reduced it to two parts: (a) determination of what assets are subject to the payment of the respective claims; and (b) the method of valuation.

As to the first question, the Court emphasizes that under the full and absolute priority rule of the *Boyd* case and *Los Angeles Lumber Products Co.* case, after the bondholders of Consolidated have been satisfied, its unmortgaged assets are subject to claims of the subsidiary companies, if their claim to \$5,000,000, or any part thereof, is valid. The Court brushes aside the contention that the creditors of the subsidiaries are barred from recourse against the unmortgaged assets of Consolidated, by reason of an inter-company agreement which states that the claim is not for the benefit of any third party. By reason of the breach of fiduciary duty which the parent company owes to the subsidiaries and creditors of the latter, that provision of the agreement is found wholly ineffectual as against bona fide creditors of the subsidiaries.

The opinion also finds the Plan defective because no showing is made that it is fair as between the bondholders of Union and those of Consumers. With reference to this the Court points out that the net income of the new company is divided equally to service the new securities issued to bondholders of the two subsidiaries, notwithstanding that the assets of Union are much greater in volume and value than those of Consumers. The Court states that as they have no separate earnings records, an appropriate formula must be designed to determine their separate values, saying:

That allocation is attacked here by respondent as discriminatory against Union, on the ground that the assets of Union are much greater in volume and in value than those of Consumers. It does not appear from this record that Union and Consumers have individual earnings records. If they do not, some appropriate formula for at least an approximate ascertainment of their respective assets must be designed in spite of the difficulties occasioned by the commingling. Otherwise the issue of fairness of any plan of reorganization as between Union and Consumers bondholders cannot be intelligently resolved.

The Court then approaches the problem of the method of valuation, and strongly emphasizes the criterion of prospective earnings as indispensable. As to this, the opinion observes:

As Mr. Justice Holmes said in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 226, "valuation of income from it." . . . Such criterion is the appropriate one here, since we are dealing with the issue of solvency arising in connection with reorganization plans involving productive properties. It is plain that valuations for other purposes are not relevant to or helpful in a determination of that issue, except as they may indirectly bear on earning capacity. . . . The criterion of earning capacity is the essential one if the enterprise is to be freed from the heavy hand of past errors, miscalculations or disaster, and if the allocation of securities among the various claimants is to be fair and equitable.

Attention is then turned to the question, whether and to what extent the absolute priority rule of the *Boyd* case and the *Los Angeles Lumber* case applies to the

reorganization of solvent as well as insolvent companies. The opinion unqualifiedly asserts that the same rule applies whether the company is either solvent or insolvent in the equity of the bankruptcy sense.

But the priority rule must be adapted to the requirements of feasibility and must allow for simpler and more conservative capital structures. As to actual application of priority, the Court refuses to lay down a rigid formula and suggests that practical adjustments are necessary.

Mr. Paul R. Watkins argued the case for petitioners in No. 400, and Mr. Graham L. Stirling, Jr., for petitioners in No. 444; Mr. Kenneth E. Grant for respondent; and Mr. Solicitor General Biddle for the S.E.C., as amicus curiae.

Federal Procedure—Removal of Causes—Finality of State and Federal Court Decisions Denying Removal

Certiorari presenting the questions whether the Supreme Court may hold invalid a default judgment entered by a state court in a garnishment proceeding after denial by the state court of a petition for removal to a Federal district court, when, after denial of removal by the state court, the defendant filed in the federal court a petition to remove, which the Federal court subsequently denied; and whether the state court was free to disregard a disclosure, filed in the Federal court before default judgment in the state court proceeding was entered.

Metropolitan Casualty Ins. Co. v. Stevens. — Adv. Op. —, 61 Sup. Ct. Rep. 715, — U.S.L.W. —. (No. 425, decided March 17, 1941.)

The opinion of the Court by Mr. JUSTICE MURPHY holds that the state court was authorized to enter the default judgment and that the petition for removal filed in the state court did not deprive that court of power to act until the Federal Court had determined the issue of removability and that the state court did not commit error in failing to accord legal effect to the disclosure filed in the Federal court on petition for removal. The opinion states that when a petition for removal is denied by the state court the petitioner has three alternatives: (1) to object to the rule, save an exception, and litigate in the state courts, in which case he may have the order of the state court denying his petition for removal reviewed in the state appellate courts and in proper cases in the Supreme Court of the United States; (2) he may remove the suit to the Federal court despite the ruling of the state court, in which case if the Federal court entertains jurisdiction, his adversary after filing judgment may contest the question on appeal in the Federal courts; or (3) he may proceed in both courts at the same time, in which case he and his adversary may obtain review of removability by the respective courses just outlined.

The opinion points out that the removing party is protected whichever course he elects for if he makes timely application for removal and properly objects to its denial by the state court, participation in subsequent proceedings in the state court does not waive his claim to have the case litigated in the Federal courts; and if he removes the case notwithstanding the state court ruling, he may nevertheless resist further action by his opponent in the state court.

The opinion points out, however, that if the Federal court refuses to assume jurisdiction and remands the case, the issue of removability is foreclosed, since section 28 of the Judicial Code precludes the review of a remand order, directly or indirectly. Thus assuming that the state court had jurisdiction, it was for that court to determine the effect of the disclosure in the Federal court and to disregard it if it saw fit. The

opinion points out that if in cases like the present the state court is assured that the Federal court will promptly decide the question of removability, it is better practice to await that decision, but it is not a denial of a Federal right if the state court fails to do so and the cause was not removable.

The case was argued on February 13, 1941, by Mr. Alan W. Boyd for petitioner and by Mr. B. A. Wendrow and Mr. William E. Crane for respondents.

Summaries

Admiralty—Limitation of Liability—Survival of Personal Liability for Torts—Effect of State Statutes

Just v. Chambers, 85 Adv. Op. 569; 61 Sup. Ct. Rep. 687; U. S. Law Week 4244, (No. 373, decided March 3, 1941).

Certiorari was granted here to determine whether in an admiralty proceeding for limitation of liability brought by the estate of the owner of the vessel, the personal liability of the owner for the personal injuries to guests upon the vessel, rising out of the tort, survives the death of the owner.

The Court's opinion by MR. CHIEF JUSTICE HUGHES holds that since the accident occurred within the maritime waters of the State of Florida, in which by local statute the right of action survives the wrongdoer's death, the liability survives. This conclusion is based upon the underlying policy of limitation of liability proceedings in admiralty to determine all claims against the vessel and its owner arising out of the controversy, even though limitation is not granted. The opinion holds that the Florida Statute removing the common law restriction on survival of personal claims has in this case modified the admiralty rule that the liability does not survive.

The case was argued on February 5 and 6, 1941, by Mr. Raymond Parmer for respondent and concluded by Mr. W. O. Mehrrens for petitioner.

Federal Procedure—Sufficiency of Evidence to Sustain Verdict—Motion for Directed Verdict

Conway v. O'Brien, 85 Adv. Op. 574, 61 Sup. Ct. Rep. 634; U. S. Law Week 4227, (No. 344, decided March 3, 1941).

Certiorari to review the judgment of the Circuit Court of Appeals which reversed and dismissed an action in the district court arising out of an automobile collision and brought under the Vermont Guest Occupant law, which requires the plaintiff to prove the gross negligence of the defendant. At the close of the case, defendant had made a motion for a directed verdict, which the district court denied. The case had then been submitted to the jury, which brought in a verdict for the plaintiff. The question was presented whether under Rule 50(b) of the Federal Rules of Civil Procedure, the circuit court correctly dismissed the case, instead of ordering a new trial, since no motion for judgment notwithstanding the verdict was made by the defendant in the district court.

The Court's opinion by MR. JUSTICE REED reviews the evidence in some detail in the light of the Vermont law. It concludes that the district court correctly submitted the case to the jury, and that the circuit court erred in deciding that it should not have done so. In this view of the case the opinion finds it to be unnecessary to construe Rule 50(b).

The case was argued on February 4 and 5, 1941, by Mr. Paul E. Lesh for petitioner and by Mr. Edwin W. Lawrence for respondent.

Federal Procedure—Sufficiency of Evidence to Sustain Verdict—Motion for Directed Verdict

Berry v. United States, 85 Adv. Op. 576; 61 Sup. Ct. Rep. 637; U. S. Law Week 4227. (No. 336, decided March 3, 1941).

Certiorari to review the judgment of the Circuit Court of Appeals which reversed and dismissed an action in the district court arising out of a War Risk Insurance policy. At the close of the trial, the government moved for a directed verdict, which was denied. The jury returned a verdict for the plaintiff. Here, as in *Conway v. O'Brien, Supra*, the government had made no motion for judgment notwithstanding the verdict, and the question was presented whether the action of the circuit court was correct under Rule 50 (b) of the Federal Rules of Civil Procedure.

The Court's opinion by Mr. JUSTICE BLACK, approaches the problem in the same way as in the *Conway* case, and concludes as in that case that there was evidence from which the jury could conclude that the plaintiff was totally and permanently disabled, and therefore the verdict should have been allowed to stand. The proper procedure under Rule 50(b) is therefore not decided.

The case was argued on February 4, 1941, by Mr. Ernest W. Gibson, Jr., and Mr. C. L. Dawson for petitioner and by Mr. Warner W. Gardner for respondent.

Federal Procedure—Intervention—Anti-Trust Proceedings

Missouri-Kansas Pipe Line Company v. United States, Panhandle Eastern Pipe Line Co. v. U. S., 85 Adv. Op. 586; 61 Sup. Ct. Rep. 666; U. S. Law Week 4221, (Nos. 268 and 269, decided March 3, 1941).

Appeal from an order of a district court which denied two attempts to intervene in a proceeding instituted by the government to reopen a consent decree obtained by it in 1935 by suit in equity to enforce the anti-trust laws. The intervention was sought on behalf of the Panhandle Company. The protection of that company's opportunity to compete, had been the objective of the original consent decree.

The court's opinion by Mr. JUSTICE FRANKFURTER holds that since Panhandle's right to economic independence was the heart of the controversy, and was explicitly provided for in the decree, which also provided that Panhandle might "upon application," "become a party" to enforce those provisions, the district court was in error in denying the applications to intervene, and its determination was appealable. It holds that the fact that the efforts to intervene were not made by Panhandle, but by another corporation which had formerly controlled Panhandle, but which now owned only a minority of its stock does not defeat its right to assert Panhandle's interest. It also holds that the general doctrines of Rule 24(a) of the Federal Rules of Civil Procedure are inapplicable, since the protection of the rights conferred by the consent decree was the sole purpose of the motion.

Mr. JUSTICE ROBERTS noted partial disagreement in the result.

Mr. JUSTICE DOUGLAS and Mr. JUSTICE MURPHY did not participate.

The case was argued on February 12 and 13, 1941, by Mr. Arthur G. Logan and Mr. Robert J. Bulkley for Panhandle Eastern Pipe Line Co. and Missouri-Kansas

Pipe Line Company; by Mr. Douglas M. Moffat and Mr. William H. Button for Columbia Oil and Gasoline Corp.; by Mr. James H. Lee as *amicus curiae* for Assistant Attorney General Arnold for United States.

Federal Procedure—Habeas Corpus—Due Process of Law

Ex parte Cleio Hull, 85 Adv. Op. 583; 61 Sup. Ct. Rep. 640; U. S. Law Week —, (No. — Original, decided March 3, 1941).

In this case the petitioner had been convicted of an offense by a state court and later paroled. Subsequently he was convicted again and returned to prison for a new term. Since the second conviction was considered as a violation of parole, a hearing was held before the state parole board which passed petitioner indefinitely toward the maximum sentence for the first offense. Petitioner then prepared a petition for habeas corpus, which the prison officials failed to allow to be perfected because of a prison regulation which required all legal documents to be approved by certain parole board officials. In spite of this rule the petition was somehow filed with the Supreme Court after much delay. It charged that the prison regulation was invalid as a denial of procedural due process.

As to this, the opinion of the Court by Mr. JUSTICE MURPHY, sustains the petitioner, observing that although the considerations prompting the regulation are meritorious, yet the state may not thus restrict the right to apply to a Federal Court for the writ, and the sufficiency of such an application is for the court to determine.

It was argued that the petition was premature, since it attacks the second conviction, while petitioner is still confined under his first conviction by revocation of his parole. The opinion holds the application not to be premature, since he was at liberty on parole when the second offense was charged against him, and the recommitment was, in any event, due solely to the second conviction. The court then considers whether the petition should be entertained, and an answer required, as to the alleged variance in pleading and proof at the second trial, concerning the date of commission of the offense. As to this, the court concludes that the showing made by the petition is insufficient and the motion for leave to file it was therefore denied.

Federal Taxation—Estate Tax—"Insurance" Defined

Helvering v. Le Gierse; Keller v. Commissioner, 85 Adv. Op. 594 and 597; 61 Sup. Ct. Rep. 646 and 651; U. S. Law Week 4213, 4214. (Nos. 237, 371, decided March 3, 1941).

Certiorari to resolve conflicting decisions as to the meaning of the words "receivable as insurance" used in Sec. 302(g) of the Revenue Act of 1926, which provides for valuation of the gross estate of a decedent for purposes of taxation and exempts certain insurance from the estate. The policy involved in number 237 was obtained by the decedent at the age of 80, less than a month before death, simultaneously with a standard form annuity contract, and provided for a lump sum payment of \$25,000 to decedent's daughter at decedent's death. The premium was paid in full when the contracts were executed. No physical examination was required, and the insurance contract would not have been issued without the annuity contract. The transaction in No. 371 was similar, except that there

a physical examination was required, and the original consideration for the contract was subsequently increased.

The Court's opinions by MR. JUSTICE MURPHY holds that the meaning of the statute is that the amounts received as insurance must be received as a result of a transaction which involved an actual "insurance risk" at the time the transaction was executed. They conclude that the contracts in issue did not involve such a risk. In reaching this conclusion the Court emphasizes the interrelationship of the annuity and the insurance. It finds no reason for different conclusions in the two cases because of their slightly different facts. The CHIEF JUSTICE and MR. JUSTICE ROBERTS indicated their dissent for the reasons stated in the circuit court opinion in *Commissioner v. Le Gierse*, 110 F. (2d) 734.

No. 237 was argued on January 9 and 10, 1941 by Mr. Frederick O. McKenzie for respondents; No. 371 was argued on January 10, 1941 by Mr. Ferdinand T. Wild for petitioner. Both cases were argued for the respondent by Assistant Attorney General Clark.

Safety Appliance Acts—Enforcement of Rights Created

Breisch v. Central Railroad of New Jersey, 85 Adv. Op. 599; 61 Sup. Ct. Rep. 662; U. S. Law Week 4225 (No. 384, decided March 3, 1941).

Certiorari to review a judgment on a verdict for petitioner in an action for personal injury. The injury was sustained by petitioner while engaged in intrastate transportation, but as an employee of a rail carrier engaged also in interstate commerce. It was found to have been caused by the use of a defective appliance, which constituted a violation by the respondent of the Federal Safety Appliance Acts.

The action was brought at law in a federal court in Pennsylvania, on the ground of diversity of citizenship. The Circuit Court reversed the judgment of the District Court on the ground that petitioner's remedy lay solely in the Pennsylvania Compensation Act, and was not cognizable at law.

On certiorari this, the ruling of the Circuit Court, was reversed in an opinion by MR. JUSTICE REED. The opinion points out that the Safety Appliance Acts create the right of recovery in the circumstances here involved, but leave the remedy to the discretion of the states. An analysis of the rulings in Pennsylvania then follows, leading to the conclusion that in Pennsylvania the State Compensation Act leaves the enforcement of rights fixed by federal statutes as they were prior to the enactment of the state legislation.

MR. JUSTICE ROBERTS dissented without opinion.

The case was argued by Mr. Fred B. Gerner for the petitioner, and by Mr. Henry B. Friedman for the respondent.

Torts—Fraudulent Representations in Sale of Securities

Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co., 85 Adv. Op. 631; 61 Sup. Ct. Rep. 623, U. S. Law Week, 4236 (No. 291, decided March 3, 1941).

This certiorari reviews a judgment of the Circuit Court of Appeals reversing a judgment of the United States District Court for Northern Illinois, entered on a verdict for the petitioner for \$66,150.

The petitioner's action was for damages for losses sustained in consequence of the purchase of certain local improvement bonds, which, as alleged, the peti-

tioner was induced to make by the respondent's fraudulent representations.

The alleged misrepresentations involved the location, extent and value of property within the local improvement district, the amount of indebtedness of the district and the financial condition of a guarantor of the bonds.

The respondent's defense rested chiefly on a "hedge clause," in the offering circular to the effect that: "All statements herein are official, or are based on information which we regard as reliable, and while we do not guarantee them, we ourselves have relied upon them in the purchase of this security."

The Supreme Court, in an opinion by MR. JUSTICE STONE, reversed the ruling of the Circuit Court, and held that the case had been properly submitted to the jury on instructions as to Iowa law relating to fraudulent representations, the purchase having been induced in Iowa. The instructions approved as correctly stating the Iowa law on the subject relate chiefly to reckless statements and half truths. The Court notes that even the "hedge clause," on the evidence, was made under such circumstances as to permit a finding by the jury that it was false itself.

The case was argued by Mr. Joseph G. Gamble for the petitioner, and by Mr. Edward R. Johnston for the respondent.

Gift Tax—Exemption of Gift to Extent of \$5,000—Status of Beneficiaries of a Trust

Helvering v. Hutchings, 85 Adv. Op. 623; 61 Sup. Ct. Rep. 653; U. S. Law Week, 4233 (No. 419, decided March 3, 1941).

United States v. Pelzer, 85 Adv. Op. 624; — Sup. Ct. Rep. —; U. S. Law Week, 4234 (No. 393, decided March 3, 1941).

Ryerson v. United States, 85 Adv. Op. 629; 61 Sup. Ct. Rep. 656; U. S. Law Week, 4235 (No. 495, decided March 3, 1941).

Three cases present questions under Section 504(b) of the Revenue Act of 1932.

In No. 419, the Court, in an opinion by MR. JUSTICE STONE, determines that the \$5,000 exemption allowed by that section applies to the several beneficiaries, separately, who receive gifts under a transfer under a single trust. The Government's contention was that the trust or the trustee is the donee, and as there was but a single trust only one deduction of \$5,000 was allowable, although there were seven beneficiaries under the trust. This argument was rejected.

In No. 393, in addition to the foregoing question, there was also involved a question as to whether certain gifts were future interests, which by the terms of the statute are not entitled to the benefit of the \$5,000 exemption. The Court, in an opinion by MR. JUSTICE STONE, examines the terms of the trust, and concludes that the interests created for the beneficiaries were future interests. The Court holds that determination of whether interests are future interests within the meaning of the Revenue Act is not controlled by local definitions of property or refinements of conveyancing under State law.

In No. 495, again, the questions open concerned the status of gifts in trust as future interests. An examination of the two trusts involved led to the conclusion that they were "future interests." The opinion of the Court by MR. JUSTICE STONE, observes that "all who might become entitled to the use and enjoyment of the trust, principal and income, were ascertainable only upon the happening of one or more uncertain future events, sur-

vivorsehip of one or more persons at the death of the donor, and so they were donees of gifts of 'future interests' within the meaning of Section 504(b) and the treasury regulations. Consequently petitioners are not entitled to the single exclusion which the Court below allowed. But because the Government has sought no cross-petition attacking the judgment below, it is affirmed."

Mr. Solicitor General Biddle argued these cases for the Government, and Mr. Rupert R. Harkrider & T. W. Lain for the respondent in 419. Mr. Robert A. Littleton for the respondent in 393, and Mr. William N. Haddad in 495.

Federal Taxation—Income of Trust Estates—Scope of Appeal

Hormel v. Helvering, —Adv. Op. —, 61 Sup. Ct. Rep. 719, U. S. Law Week —; *Helvering v. Richter*, —Adv. Op. —, 61 Sup. Ct. Rep. 723, U. S. Law Week — (Nos. 257, 516, decided March 17, 1941).

Certiorari was granted in these cases to resolve conflicting decisions of the circuit courts as to whether the Commissioner in asserting for the first time in the circuit court of appeals a reliance upon section 22(a) of the Revenue Act of 1934, in seeking to justify the inclusion as gross income of income received by the creator of a trust of which he and his wife were beneficiaries and over which he and his wife had control, had so changed the theory of the case from that presented in the Board of Tax Appeals, where other sections had been relied upon to establish taxability, as to preclude the circuit court from considering the question of the applicability of section 22.

The Court's opinions, both by Mr. JUSTICE BLACK hold that although ordinarily an appellate court does not give consideration to issues not raised before, yet that principle is not inflexible, particularly in view of the statutes which require the circuit courts, when reviewing Board of Tax Appeals decisions, to modify, reverse or remand decisions not in accordance with law "as justice may require."

The opinion also holds, that the circuit court having reached the conclusion that § 22(a) might apply, should remand the case to the Board to afford the taxpayer an opportunity to introduce evidence on this issue if he so desires.

The cases were argued on March 3 and 4, 1941, by Mr. Richard H. Wilmer for Richter; by Mr. George M. Wolfson and Mr. R. C. Alderson for Hormel; and by Mr. Assistant Attorney General Clark for Helvering.

Criminal Procedure—Sufficiency of Indictment

Edwards v. U. S. 85 Adv. Op. 563, 61 Sup. Ct. Rep. 669, U. S. Law Week 4223. (No. 377, decided March 3, 1941.)

Certiorari involving the correctness of the affirmance by the Circuit Court of Appeals of a sentence imposed after a plea of nolo contendere to an indictment arising out of a fraudulent scheme of selling interests in oil and gas leases in Oklahoma and Texas on counts charging violations and conspiracy to violate the fraud and registration provisions of the securities act, and the mail fraud statutes. The district court had overruled a plea in bar filed prior to the plea of nolo contendere based on the amnesty granted by section 22(c) of the

securities act to persons who are compelled to testify in proceedings before the Securities Exchange Commission.

As to this, disagreeing with the conclusion of the circuit court, the opinion of the Supreme Court by Mr. JUSTICE REED holds that the plea in bar is good upon its face. The opinion points out that the allegations of the plea may not be weighed separately and that the defendant's identity and relation to the trusts alleged to have been created by him as a part of the fraudulent scheme were of primary importance to the proof of criminality. The Government also urged that the plea was properly overruled because defendant had failed to prove its allegations. As to this, the Court points out that the defendant had been overruled in his attempt to require the Government to produce the transcript of proceedings before the securities commission. The Government also contended that the refusal to order production of the transcript was not prejudicial since it had offered to produce it in the trial court and had actually produced it in the court of appeals. As to this the opinion holds that neither offer was adequate.

The opinion also considers objections to specific counts of the indictment and disposes of them summarily.

Mr. JUSTICE DOUGLAS did not participate.

The case was argued on February 12, 1941, by Mr. J. Forrest McCutcheon for petitioner and by Mr. Richard H. Demuth for respondent.

Due Process of Law—Authority of State Regulatory Bodies to Make Orders Under State Law

Railroad Commission of Texas v. The Pullman Company, 85 Adv. Op. 580; 61 Sup. Ct. Rep. 643, U. S. Law Week 4220. (No. 283, decided March 3, 1941.)

Appeal from a specially constituted three-judge court which had enjoined the enforcement by the Texas Railroad Commission of its order requiring sleeping cars operated on lines within the state to be in charge of Pullman conductors. The order had been assailed in the district court on the ground that it was unauthorized by the Texas law and that it violated the equal protection, due process, and commerce clauses of the Constitution. The Pullman porters had intervened and objected to the order on the ground that since all Pullman porters are colored and all conductors are white the order discriminated against Negroes in violation of the Fourteenth Amendment.

The Court's opinion by Mr. JUSTICE FRANKFURTER holds that while the complaint of the Pullman porters tendered a substantial Constitutional issue, yet since there was doubt whether the Commission's order was authorized under Texas statutes, the decision of the Constitutional issue should await the determination of that question, and the Federal equity courts in exercising a wise discretion should restrain the exercise of their authority until this question of state law has been determined by a competent state tribunal. The case was therefore remanded to the district court with directions to retain the bill pending a determination of proceedings to be brought with reasonable promptness in the state court to determine whether the order was authorized under Texas law.

Mr. JUSTICE ROBERTS did not participate.

The case was argued on February 4, 1941, by Mr. Cecil A. Morgan for Cunningham et al; by Mr. Cecil C. Rotsch for Railroad Com. of Texas; by Mr. Ireland Graves for appellees.

CALIFORNIA UNFAIR PRACTICES ACT AND FAIR TRADE ACT

BY HON. EMMET H. WILSON*

Of the Los Angeles Bar

THE Fair Trade Act of California is of such recent origin and the campaign for the enforcement of the Unfair Practices Act of that state has so lately been launched that there are few reported decisions in California or in other states to guide trial courts in the important and diversified problems that arise under these statutes in industrial and mercantile businesses. It has been my good fortune to pioneer in this but little explored legal field, as a judge of the Superior Court of Los Angeles County, an opportunity which I have welcomed. Obviously it would be indecorous for me to discuss questions that may arise before me in the course of future litigation. Therefore what is here said will be based on decisions that have already been rendered in contested cases.

The Unfair Practices Act and the Fair Trade Act are not price fixing statutes. The former forbids practices which tend to foster monopolies and to destroy competition and applies to all commodities of general use or consumption, and the latter relates only to commodities bearing the trade-mark, brand, or name of the producer and authorizes him to protect his good will by fixing the retail price of his products.

The Unfair Practices Act

The Unfair Practices Act was adopted by the legislature in 1913.¹ It was directed against discrimination in prices between different sections, communities, or cities, or portions thereof, of the state with the intent to destroy the competition of any regular established dealer or to prevent the competition of one who, in good faith, intended to become a dealer. The act provided that in an action to enjoin violation of its provisions it was not necessary that actual damage to the plaintiff be alleged or proved. For eighteen years the act remained dormant.

The genesis of the statute is interesting and probably accounts for the lack of activity in its enforcement for so many years. The public utility company which furnished electricity in the City of Pasadena and surrounding territory had been charging a lower rate in that city than elsewhere for the purpose of diverting customers from the municipal power system. In order to prevent such action by the power company the city officials proposed and procured the passage of the statute by the legislature. It originally applied not only to ordinary commodities but to "the product or service of any public utility." After the adoption of the act the discrimination between localities ceased. In the amendment of 1937 the quoted phrase was omitted, and it was provided that the act should not apply to any service for

*Judge of the Superior Court of Los Angeles County. This paper is a revision of an address delivered December 16, 1940, before Los Angeles Patent Law Association.

[Note. In the following citations "Stats." refers to Statutes of California; "Super. Ct." refers to written opinions of the author filed in cases in the Superior Court of Los Angeles; "CCH" means Commerce Clearing House Trade Regulation Service; "P-H" means Prentice-Hall Federal Trade and Industrial Service; "UPA" refers to the Unfair Practices Act; "FTA" refers to the Fair Trade Act.]

1. Stats. 1913, ch. 276, p. 508.

which rates were established under the jurisdiction of the Railroad Commission and furnished by any public utility corporation.

At the legislative session of 1931 several sections were amended, but the statute was not broadened to cover unfair trade practices other than discrimination.² At the same session the Fair Trade Act was adopted.³ In 1933 two amendments were passed, one prohibiting the secret payment or allowance of rebates, refunds, commissions, or unearned discounts or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing on like terms and conditions, to the injury of a competitor, and where such payment or allowance tended to destroy competition,⁴ the other forbidding the sale of any article or product at less than the cost thereof to the vendor, or the giving away of any article or product, for the purpose of injuring competitors and destroying competition.⁵

By an amendatory statute passed in 1935 the entire act was completely revised and the sections renumbered, several provisions were clarified, definitions changed, and new definitions added.⁶ In 1937 several sections were amended, two were repealed, and new sections added covering matters which, by experience in the enforcement of the statute, had been found to be necessary.⁷ By these amendments the practice of using any article or product as a "loss leader" was prohibited, loss leader being defined as any article or product sold at less than cost for the purpose of inducing the purchase of other merchandise, or which might have a tendency to mislead or deceive purchasers, or which diverted trade from or otherwise injured competitors. In 1939 the act was again amended.⁸ It is now provided that if the court shall find, in any action to enjoin a violation of the statute, that a defendant has violated any of its provisions the court must and shall enjoin him from so doing, and, in addition, the court may, in its discretion, include such other restraint as it deems expedient in order to deter the defendant from committing a future violation of the act.

Purpose of the Statute

The prevention of injury to competitors and of destruction of competition is the theme of the statute. The legislature has declared that the purpose of the act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair, destructive, and discriminatory practices by which fair and honest competition is destroyed or prevented.⁹ Discrimination in prices as between localities,¹⁰ selling for less than cost, and the

2. Stats. 1931, ch. 617, p. 1333.

3. Stats. 1931, ch. 278, p. 583.

4. Stats. 1933, ch. 261, p. 793.

5. Stats. 1933, ch. 504, p. 1280.

6. Stats. 1935, ch. 477, p. 1546.

7. Stats. 1937, ch. 860, p. 2395.

8. Stats. 1939, ch. 175, p. 1424.

9. UPA Sec. 13; Stats. 1937, ch. 860, p. 2395.

10. UPA Sec. 1; Stats. 1937, ch. 860, p. 2395.

use of loss leaders¹¹ are unlawful only when done for the purpose of destroying competition or injuring competitors, and the secret payment or allowance of rebates, refunds, and commissions is forbidden if it tends to injure a competitor or to destroy competition.¹² The doing of any of these acts without malevolent intent is not forbidden. A statute which prohibited price discrimination between different localities, without qualification as to intent, was held to be unconstitutional as impairing the private right of freedom of contract,¹³ but a law forbidding price discrimination between different sections of the state "intentionally, for the purpose of destroying the competition of any regular established dealer" was sustained.¹⁴

Under the California statute intent is the gravamen of the offense, and, like any other necessary allegation, must be alleged in a complaint seeking an injunction or in a criminal complaint, and must be proved. But proof of one or more acts of selling any article or product below cost or at discriminatory prices, or of giving the same away, together with proof of the injurious effect of such acts is presumptive evidence of the purpose or intent to injure competitors or to destroy competition.¹⁵ This is a disputable presumption and may be overcome in the same manner as other such presumptions. When a trade or industry of which the person complained against is a member, has an established cost survey for the locality in which the offense is alleged to have been committed, the cost survey is deemed to be competent evidence to be used in proving the defendant's costs¹⁶ and "cost" is defined by the statute.¹⁷ Such a cost survey, it will be observed, is not conclusive evidence, but the defendant may rebut it by other evidence. As the cost survey is declared by the statute to be competent evidence, if it is not refuted by the defendant the court would no doubt accept it as sufficient proof of the defendant's costs.

The constitutionality of the Unfair Practices Act has been sustained.¹⁸ In the *Wholesale Tobacco Dealers*' case the Supreme Court states that the police power of the state extends not only to the preservation of the public health, safety, and morals, but to the protection and promotion of the public welfare, that such power is frequently used to promote the general prosperity of the state by the regulation of economic conditions, and that the welfare of the state and its people is promoted and preserved by the prevention of monopolies and the fostering of free, open, and fair competition and the prohibition of the unfair trade practices mentioned in the statute.

After the decision in the *Tobacco* case, trade associations throughout the state, and particularly in Los Angeles County, began an intensive campaign to enforce the statute. As it is a new subject, novel questions constantly arise with reference to the enforcement of the act. Obviously, one of the first to be raised was who may maintain an action to prevent its violation.

Who May Maintain Action

Injunction suits, generally speaking, are required to be brought by an injured party, and he must allege

damage or injury to himself, but express special provisions are made by the Unfair Practices Act for the maintenance by any person or any trade association of actions to restrain violations¹⁹ and it is not necessary to allege or prove actual damage or injury, or the threat thereof, to the plaintiff.²⁰ A special act dealing with a particular subject prevails over existing provisions of a general law.²¹ The Unfair Practices Act, while general in the field which it covers, nevertheless is a special statute dealing with the single specific subject of unfair trade practices and its provisions authorizing actions for injunction to be maintained by any person or trade association is given effect, prevailing over the general statutory provisions relating to the granting of injunctions.²² The term "person" used in section 10 is comprehensive and includes any person, firm, association, organization, partnership, business trust, company, corporation, or municipal or other public corporation.²³ A trade association is entitled to maintain such an action without alleging damage to itself occasioned by the defendant's violation of the statute.²⁴ A statute may confer the right on private individuals to bring actions in the public interest although the persons who prosecute the actions will suffer no damage from the acts if not enjoined.²⁵ Actions to enforce the Unfair Practices Act are not brought expressly in aid of any individual, although the restraint of unlawful competition is a direct benefit to the offender's competitors. The injunction is for the benefit of the public in general in that it carries out the purpose of section 13 of the act²⁶ by restraining unfair practices.

Frequently at preliminary hearings, held to determine whether injunctions *pendente lite* should issue, the court is compelled to reach its conclusion from affidavits filed by the respective parties that are in direct conflict as to whether the defendant has violated the law. In such cases the court must balance the conveniences and determine which order, the granting or the refusing of a preliminary injunction, will cause less harm pending the trial.²⁷ When a defendant denies that he has violated the statute it is customary to argue that he should not be burdened with the stigma of an injunction. This must be taken into consideration with other matter contained in the affidavits in balancing the conveniences and in doing equity as nearly as is possible in view of the conflicting statements. If a preliminary injunction is granted it can do no more than prevent unlawful trade practices, and the defendant will not be restrained from doing anything which the law permits. On the other hand, if the preliminary injunction is denied the defendant may continue to commit the same acts with which he is charged, together with other unlawful practices, to the injury of his competitors.²⁸

19. UPA Sec. 10; Stats. 1939, ch. 175, p. 1424; Civil Code, sec. 3369.

20. UPA sec. 10; note 19, *supra*.

21. So. Cal. Allied Food Bureau v. Carnation Co., Super. Ct. Nov. 1939, 3 CCH par. 25,344, PH 97,035; Better Business Bureau v. Consol. Appliance Dealers, Super. Ct. May 1940, CCH par. 25,465, P-H par. 97,083.

22. Better Bus. Bureau v. Consol. App. Dealers, note 21, *supra*.

23. UPA sec. 16; Stats. 1937, ch. 860, p. 2395.

24. Wholesale Tobacco Dealers' case, note 18, *supra*; Better Bus. Bureau v. Consol. App. Dealers, note 21, *supra*; Institute of Automobile Dealers v. Dunham & Co., Super. Ct. Nov. 1940, CCH par. 25,559, P-H par. 97,125.

25. Inst. of Auto. Dealers v. Dunham & Co., note 24, *supra*.
26. Note 9, *supra*.

27. Food & Grocery Bureau v. Great Atl. & Pac. Tea Co., Super. Ct. Dec. 1938, 3 CCH par. 25,188.

28. *Ibid.*

11. UPA Sec. 3; Stats. 1939, ch. 175, p. 1424.

12. UPA Sec. 7; Stats. 1935, ch. 477, p. 1546.

13. Fairmont Creamery Co. v. Minnesota, 274 U. S. 1.

14. Central Lumber Co. v. South Dakota, 226 U. S. 157.

15. UPA Sec. 5; Stats. 1937, ch. 860, p. 2395.

16. *Ibid.*

17. UPA Sec. 3; note 11, *supra*.

18. Wholesale Tobacco Dealers Bureau v. National Candy etc. Co., 11 Cal. (2d) 634; Dunnell v. Shelley, 38 Cal. App. (2d) 119; People v. Kahn, 19 Cal. App. (2d) (Supp.) 758. See also Balzer v. Caler, 11 Cal. (2d) 663.

Conflict of Statutes

An action was commenced against a dairy company²⁹ charging that it had discriminated in prices by selling milk at a lower price in one portion of the county than in another, had sold milk at less than cost, had engaged in the practice of selling milk as a loss leader, and had made secret payments or allowances of rebates, refunds and commissions. The defense was that the restrictions of the Unfair Practices Act were inapplicable to the sale of milk but that the Milk Stabilization Act,³⁰ which delegated to the Director of Agriculture the administrative duty of prescribing minimum wholesale and minimum retail prices of fluid milk and fluid cream, was paramount as to those products. It was held in that case that the Unfair Practices Act was general in its effect in that it applied to the sale of all articles and commodities, and that the Milk Stabilization Act was a special act regulating the price of fluid milk and fluid cream only, withdrawing those commodities from the field of competitive sale in which other commodities remained under the Unfair Practices Act, and therefore was a special act which took precedence over the Unfair Practices Act as to fluid milk and fluid cream.³¹ The same ruling was made in an action brought by an ice cream manufacturer to restrain a competitor from allowing rebates and refunds.³²

One who is engaged in the printing business and prints circulars and newspapers in quantities for other persons is a producer, his customers are purchasers, the newspapers and circulars are articles or products of general use or consumption, within the meaning of Section 1 of the statute, and an injunction will lie to restrain the printer from selling his product for less than cost and from using any article or product as a loss leader for the purpose of injuring a competitor or of destroying competition.³³ The application of the Unfair Practices Act to the business of printing newspapers is not an unconstitutional abridgment of the freedom of the press. The statute does not purport to restrict or regulate the material printed in newspapers or the manner of their circulation, but merely prohibits the printer, as a contracting producer supplying articles to his customers, from selling the finished product below cost or using it as a loss leader.³⁴

Clean Hands Doctrine

The equitable maxim that he who comes into equity must come with clean hands is frequently offered as a defense. Injunctions have been refused in cases commenced by a trade organization, primarily for the benefit of its members, only incidentally on behalf of the general public, where it is shown that some of the members of the association have been guilty of the unfair practices charged in the complaint. In an action brought by a building material dealers' association to enjoin a nonmember from selling materials at less than cost and it was shown without contradiction that members of the association had agreed to raise prices horizontally and to present identical bids on materials to be used on a particular job, an injunction was re-

29. So. Cal. Allied Food Bureau v. Carnation Co., note 21, *supra*.

30. Agricultural Code, Div. IV, ch. 10; Stats. 1935, ch. 241, p. 922; Stats. 1937, ch. 3, p. 42; ch. 57, p. 151; ch. 710, p. 1988.

31. So. Cal. Allied Food Bureau v. Carnation Co., note 21, *supra*.

32. Balian Ice Cream Co. v. Golden State Co., Super. Ct. Oct. 1940, CCH par. 25,537, P-H par. 97,111.

33. Newspaper & Cir. Printing Assn. v. Acme Color Print Co., Super. Ct., Feb. 1940, CCH par. 25,390, P-H par. 97,055.

34. *Ibid.*

fused.³⁵ In a group of cases brought by an automobile dealers' association to restrain some of its members from selling at less than cost, and the actions appeared to have been brought on behalf of the members of the association and did not purport to have had the public benefit in mind, and the association asserted that it disclaimed representation of members who had sold automobiles contrary to the statutory restrictions, the injunction was denied because if granted it would have redounded to the benefit of the members who admittedly had violated the statute as well as to the benefit of nonoffending members.³⁶ A scheme at one time in vogue in Los Angeles for the sale of radios, washing machines, and other household appliances, was the giving of merchandise credit checks which would apply on the sale price of articles purchased by the holders of the credit checks. In an action to restrain such practices it was shown by the affidavits that no discount could be obtained on the marked price of the article if payment was offered in cash, although the credit checks were accepted as part payment.³⁷ It was held that the allowance of credit on presentation of a credit check was a gift in violation of the Unfair Practices Act, and that if credit was advertised and not given the defendants would be guilty of false advertising in violation of section 654a of the Penal Code. A preliminary injunction was granted restraining this practice and after trial of the case on its merits the injunction was made permanent.

Sales to Governmental Agencies

Two cases have been before the court involving sales at less than cost to governmental agencies. In one it was held that the statute covered sales of merchandise to an agency of the United States government,³⁸ on the theory that the Unfair Practices Act does not lay a burden on the rights and privileges of the United States, and that if a vendor is prohibited by law from selling merchandise to the Federal government for less than cost the burden on the government of paying the additional price was remote and consequential, like a state tax on gross receipts³⁹ and an occupation tax⁴⁰ imposed on a government contractor. In the other case⁴¹ sales to a municipal corporation were held to be within the restrictions of the statute, notwithstanding the power given to cities by the state constitution to provide in their charters that they may make and enforce all laws and regulations in respect to municipal affairs,⁴² of which provisions the City of Los Angeles had availed itself in its freeholders' charter and notwithstanding the requirement of the city charter that the city purchase from the lowest and best regular responsible bidder.

Although the constitutionality of the statute has been sustained as being within the police power of the state,⁴³ several objections to its validity have been made on grounds not discussed in the *Wholesale Tobacco Dealers*' case. The act declares a violation of its

35. Metr. Dist. Material Dealers Assn. v. Eastside Bldg. Materials Co., Super. Ct. April 1940, CCH par. 25,441, P-H par. 97,078.

36. Inst. of Auto. Dealers v. Chrysler Sales Corp., Super. Ct. Nov. 1940, CCH par. 25,566, P-H par. 97,126.

37. Better Bus. Bureau v. Consol. App. Dealers, note 21, *supra*.

38. Metr. Dist. Materials Assn. v. Eastside Bldg. Mat. Co., Super. Ct., Aug. 1940, CCH par. 25,521, P-H par. 97,103.

39. James v. Dravo Contracting Co., 302 U. S. 134.

40. Silas Mason Co. v. Tax Commission, 302 U. S. 186.

41. Inst. of Auto. Dealers v. Dunham & Co., note 24, *supra*.

42. Const. of Cal., Art. XI, secs. 6 and 8.

43. Note 18, *supra*.

provisions to be a crime as well as subject to being enjoined in a civil action. It has been asserted that a complaint in an injunction suit alleging a violation of the act necessarily charges the defendant with having committed a crime, ergo he has a constitutional right to have a jury determine the question of fact. This objection was rejected on the ground the action was one in equity and not on the criminal side of the court, analogous to a civil action to abate a common nuisance when the maintenance of the nuisance is a violation of a penal law.⁴⁴ The act does not purport to transfer power from the criminal court to a court of equity to inflict punishment for the commission of crimes. An equity court has no such power but it will enjoin the continued commission of acts constituting nuisances, though the acts complained of are statutory crimes.⁴⁵ The Unfair Practices Act provides two separate remedies. A criminal prosecution results, if the defendant is convicted, in the usual punishment by fine and imprisonment. He is penalized for past acts but is not prevented from continuing to violate the statute. In a civil action an injunction perpetually insures against further unfair trade practices on the part of an offender, thus promoting the purpose of the statute. Under such statutes as this obedience is more to be desired than repeated punishment for violations.

Another objection made to the validity of the act is that it forbids sales at less than cost, that the statutory definition of the term "cost" is arbitrary and uncertain, and for that reason the statute does not prescribe a reasonable standard of guilt. It was not intended by the legislature to prescribe that the cost of an article must be exact, or that it must be ascertained by any precise method of accounting, but "cost" means what business men generally mean—the approximate cost arrived at by a reasonable rule.⁴⁶

The Fair Trade Act

The Fair Trade Act was adopted in 1931.⁴⁷ Long prior to the passage of this act contracts between a vendor and a vendee whereby the latter agreed to resell merchandise at prices fixed in the contract by the vendor had been held valid and enforceable,⁴⁸ and one who purchased from the original vendee under a resale price contract was held bound thereby and the contract was enforceable at the suit of the original vendor.⁴⁹ But such contracts could not bind one who purchased from the original vendee unless such purchaser contracted to sustain the original vendor's price. Various methods attempted by manufacturers to sustain their prices were rendered ineffectual by the United States Supreme Court which held that contracts between a manufacturer and his vendee did not follow the commodity and that restrictions as to resale price could not be extended through successive sales, each of which passed title to the commodity.⁵⁰

These efforts failing, resort was had to legislation. Section 1 of the Fair Trade Act as adopted in 1931

44. *Inst. of Auto. Dealers v. Dunham & Co.*, note 24, *supra*.
45. *Ibid.*; *People v. Stralla*, Super. Ct. Oct. 1939; 1939 Am. Mar. Cas. p. 1508.

46. *Inst. of Auto. Dealers v. Dunham & Co.*, note 24, *supra*; *People v. Kahn*, note 18, *supra*.

47. Stats. 1931, ch. 278, p. 583.

48. *Grogan v. Chaffee*, 156 Cal. 611.

49. *Ghirardelli Co. v. Hunsicker*, 164 Cal. 355.

50. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 399; *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 405; *Bauer v. O'Donnell*, 229 U. S. 1; *Straus v. Victor Talking Machine Co.*, 243 U. S. 490; *Boston Store v. American Graphophone Co.*, 246 U. S. 8.

permits the fixing of the resale price of a commodity which bears the trade-mark, brand, or name of the producer or owner of the commodity and which is in fair and open competition with commodities of the same general class produced by others. It also validates contracts which provide that the buyer will not resell except at the price fixed by the vendor, and that the buyer will require any one to whom he sells to agree that he will not in turn resell except at the price stipulated by the original vendor. It was immediately found that price structures could not be maintained under this statute because many dealers refused to sign price maintenance contracts and continued to cut prices. Refusal of the manufacturers and jobbers to sell to cut rate houses met with little success. They found means of obtaining supplies from other sources. One action was filed in the Superior Court of Los Angeles County to restrain a noncontracting dealer from selling for less than the manufacturer's fixed price. An injunction was refused, the action was appealed, and the District Court of Appeals affirmed the judgment of the Superior Court.⁵¹ A hearing was granted by the Supreme Court which reversed the judgment, not because the lower courts were wrong in their respective decisions construing the statute as it existed at the commencement of the action, but because, before the Supreme Court decided the case, Section 1 1/2, to which reference is about to be made, had been added and plaintiff, by reason thereof, was entitled to an injunction under the act as it stood when the Supreme Court's final decision was made.⁵² This decision followed the rule that on an appeal involving an injunction decree the law in effect when the appellate court renders its opinion must be applied.

In order to make the statute workable Section 1 1/2 was added to the act in 1933.⁵³ This section provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. Attacks on the constitutionality of this section failed and it was held to be valid.⁵⁴

The statute does not limit the right of fixing prices to the producer or the owner. It does not provide who may fix prices nor who may make contracts relating thereto. A contract may be made by an exclusive importer and distributor in California of commodities manufactured in the United States and in foreign countries, and after notice given to a noncontracting dealer of the contract and of the prices fixed thereby, the distributor may maintain an action to restrain sales at less than the fixed price.⁵⁵

Relation of Sale Price to Value

The price of an article need have no relation to its actual value. The price may be much greater than the value but nevertheless will be enforced if the article is in fair and open competition with other articles of the

51. *Dr. Miles Cal. Co. v. Sontag Chain Stores Co.*, 47 Pac. (2d) 540.

52. Same case, 8 Cal. (2d) 178.

53. Stats. 1933, ch. 260, p. 793.

54. *Max Factor & Co. v. Kunsman*, 5 Cal. (2d) 446; affirmed 299 U. S. 198. See *Old Dearborn Distr. Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, sustaining similar Illinois statute.

55. *Parrott & Co. v. Somerset House*, Super. Ct. Jan. 1937, 3 CCH par. 25,026, P-H par. 96,243.

same general class produced by others.⁵⁶ The price is not required to be proportioned according to quantity, but the manufacturer may fix the same price for a small amount as for a larger amount, for example, the same price for a fraction of an ounce as for an ounce.⁵⁷ A manufacturer may fix his prices and sell in such quantities as may suit his methods of merchandising, and in order to avail himself of the terms of the Fair Trade Act need not put his product on the market in quantities equal to or approximating those of his competitors, and his prices need not bear any relation to the prices maintained by others.⁵⁸ The price is sustainable only when the commodity is sold in connection with the trademark, brand, or name of the producer. The restriction is not on the sale of the commodity as a commodity but is on the sale of the commodity identified with the trademark, brand, or name.⁵⁹

Discounts, Gifts and Prizes

When a manufacturer fixes a price without reference to whether sales are to be made for cash or on time, any scheme or plan whereby the fixed price is deviated from, such as the allowance of discounts, the making of gifts,

56. *DeVoine v. W. T. Grant Co.*, Super. Ct. Feb. 1938, 3 CCH par. 25,106, P-H par. 96,151; *Lenthalic, Inc. v. F. W. Woolworth Co.*, Super. Ct. March 1940, CCH par. 25,419, P-H par. 97,062; *Weco Products Co. v. Mid-City Cut Rate Drug Stores*, Super. Ct. June 1940, CCH par. 25,477, P-H par. 97,088.

57. *DeVoine v. W. T. Grant Co.*, note 56, *supra*; *Lenthalic, Inc. v. F. W. Woolworth Co.*, note 56, *supra*; *Lenthalic, Inc. v. F. W. Woolworth Co.*, 338 Pa. 523.

58. *Lenthalic, Inc. v. F. W. Woolworth Co.*, note 56, *supra*.

59. *DeVoine v. W. T. Grant Co.*, and *Lenthalic, Inc. v. F. W. Woolworth Co.*, note 56, *supra*; *Old Dearborn Distr. Co. v. Seagram-Distillers Corp.*, note 54, *supra*.

or the providing of prizes, may be enjoined. The giving of trading stamps redeemable by the dealer in merchandise or in cash is a discount or a sale for less than the fixed price, and it is not a defense that the stamps were given as an inducement to customers to pay cash.⁶⁰ The fact that an article is patented does not prevent the manufacturer from fixing the resale price if it is in competition with commodities of a like class as required by the act.⁶¹

One purpose of the act is to protect the good will of the manufacturer.⁶² An action by a manufacturer to restrain sales for less than his fixed price, may be defended on the plea that his good will has been created by misleading and deceptive advertisements of the commodity in question.⁶³

The Fair Trade Act provides that acts of unfair competition are "actionable at the suit of any person damaged thereby."⁶⁴ Thus far actions prosecuted under this statute have been brought by the manufacturer, exclusive distributor, or other person directly interested in the protection of the trade-mark, brand or name. The act does not contain the broad authorization found in the Unfair Practices Act for actions to prevent its violation. Whether a competitor of a price-cutter who is able to show actual damage by reason of the latter's acts can maintain an action for injunction remains to be decided.

60. *Weco Products Co. v. Mid-City etc. Co.*, note 56, *supra*.
61. *Idem*, Super. Ct. August 1940, CCH par. 25,523, P-H par. 97,095.

62. *Max Factor & Co. v. Kunsman*, note 54, *supra*; *Old Dearborn Distr. Co. v. Seagram-Distillers Corp.*, note 54, *supra*.

63. *Dr. Miles Cal. Co. v. Mid-City etc. Co.*, Super. Ct. June 1940, CCH par. 25,478, P-H par. 97,089.

64. FTA sec. 1½, note 53, *supra*.

THE UTILITY OF FOREIGN LAW TO THE PRACTICING LAWYER*

BY JOHN WOLFF
Lecturer in Comparative Law at Columbia University;
Member of the New York Bar

MANY learned articles have been written suggesting a score of contributions that comparative law can make in the fields of jurisprudence, legislation, government and teaching. This paper is more limited in scope and objective. Its purpose is to point out how useful a knowledge of foreign legal principles may be to the practitioner.

What I have in mind is not a litigation where, under some principle of Conflict of Laws, foreign law is applicable. I am thinking about cases arising between American citizens or corporations where American law governs, and I propose to show how, in such a case—and that, of course, is the typical case confronting the American lawyer—a knowledge of foreign legal principles may help the lawyer to win his case. The illustrations will be taken from the law of Trademarks, Unfair Competition and Constitutional Law.¹

It is interesting to note that in these fields Ameri-

can courts have from time to time referred to and been influenced by foreign legal principles. It will be convenient to illustrate this first with trade-mark and unfair competition cases. The Singer Manufacturing Company had a patent for a certain type of sewing machine. After the expiration of the patent, a competitor began to manufacture the same type of machine. This was his undoubtedly right. But he also called it a Singer machine. The Singer Manufacturing Company took the position that its exclusive right to the word "Singer" survived the expiration of the patent and sued for an injunction. It was still an unsettled question in this country. But the question had already been well settled in France. The United States Supreme Court devoted more than three pages to a discussion of the French law. What is more, it applied the French legal principles in the Singer case.²

In the more recent case of *Associated Press v. KVOS*,³ the question arose whether a radio station has the right to copy news reports published by newspapers and to broadcast such reports immediately after

*This is a modified version of a paper that was read at the annual meeting of the Association of American Law Schools in December, 1940.

1. Some of the contributions of foreign doctrines to other fields of American law, such as contracts, sales, bills and notes, torts, etc., will be discussed in separate articles.

2. *Singer Manufacturing Co. v. June*, 163 U. S. 169, 196.

3. 9 F. Supp. 279.

their publication in the papers. This question was a novel one, but a similar case had come up in Germany. The defendant discovered this German case and relied on that case in its brief. In the course of its opinion, the court used this interesting language:⁴

"The German case . . . may . . . be said to indicate the modern trend and to point out the policy of a leading European country . . . and, in so far as the principles announced therein apply to similar acts not controlled by specific act or authority, the German case is worthy of appropriate consideration here in the absence of other controlling authority to the contrary. The facts in that case are more nearly analogous to the facts in the case at bar than are those stated in any other cited case. . . ."⁵

In the case of *Bourjois v. Hermida Laboratories*,⁶ the question arose last year whether a dealer is privileged to repackage a manufacturer's trade-marked article and sell it in smaller packages under the manufacturer's trade-mark. Manufacturers, as a rule, do not like this practice because of the danger of adulteration. The United States Supreme Court, however, in the famous case of *Prestonettes v. Coty*,⁷ had held the practice permissible. The Third Circuit Court of Appeals, in the recent *Bourjois* case, had this to say about the Supreme Court decision:

"Mr. Justice Holmes lent the prestige of his great name to a doctrine that does not appeal very greatly to the sense of fairness of the ordinary man."

Then Judge Clark develops the rule that he wishes to adopt and continues:⁸

"That position [namely his own] seems to have been already adopted in Germany (citing a well known text writer). It is expressed by a leading French authority." and then he goes on to quote a long paragraph from that authority.

An analysis of the cases here discussed and others that might be added will show, I believe, that courts are inclined to rely on foreign law in two situations. First, when the question before them is a novel one that has, however, been decided abroad. Second, when the judges wish to depart from a well established American rule and find that the new rule they wish to lay down has been adopted abroad.

It is obvious, of course, that judges cannot be expected to be familiar with foreign law and that it is therefore up to the lawyer to call it to their attention. I should like now to point out some contributions foreign legal principles can make to the growth of the American law of unfair competition, contributions which lawyers will find it useful to know about.

Suppose A has committed some minor offenses in his youth but has later reformed and become a respectable and respected business man. Let us further suppose that B, a competitor, drags these all but forgotten misdeeds into the open to divert his rival's trade to himself.⁹ A may sue for libel but in a civil action for libel

4. At p. 287.

5. The decision was reversed by the Circuit Court of Appeals in 80 F. (2d) 575, which in turn was reversed by the Supreme Court in 299 U. S. 268.

It should be noted that the Circuit Court of Appeals did not challenge the District Court's opinion that foreign cases are worthy of appropriate consideration in the absence of other controlling authority. The Circuit Court of Appeals merely held that *International News Service v. Associated Press*, 248 U. S. 215, was the controlling authority.

6. 106 F. (2d) 174.

7. 264 U. S. 359.

8. On p. 176.

9. Compare *McCann v. New York Stock Exchange*, 107 F. (2d) 908. Unfortunately, derogatory statements about rival traders are not infrequent.

truth is a complete defense and it makes no difference whether defendant is a competitor or not. A may also bring an action for unfair competition. The question has not arisen yet in this country whether, in such an action, truth would be a defense. But the French courts have held for ninety years that in an action for unfair competition the truth of the defamatory statement is no defense. The reason for the rule is that matters of no real concern to the public should be kept out of the competitive struggle, that competition should proceed on the merits of the goods and services rather than on a comparison of the personalities of rival traders. The German courts have recently adopted the same rule and carried it one step further by restraining references to a rival's race, his religion, his political affiliations, his private life, etc. It is submitted that this is a desirable rule. Sooner or later, the same issue is bound to come up in this country and I am convinced that a plaintiff will have a much better chance to persuade the court to grant relief if he can show that in careful opinions rendered elsewhere relief has been given on the same set of facts.¹⁰

Suppose a manufacturer of mouthwash builds up a high reputation for his product and his trade-mark becomes well known throughout the country. Then a manufacturer of hardware, in order to reap the benefit of this reputation, adopts the same trade-mark for his own product. The mouthwash manufacturer sues for an injunction. In a situation like this, where a trademark owner, A, seeks to prevent B from using the same mark on non-competing goods, our courts grant relief if there is the likelihood of confusion of source, i.e., if the public, in seeing A's trade-mark on B's goods, would believe that B's goods are manufactured by A.¹¹ Applying this principle to our hypothetical case,¹² most American courts would probably dismiss the action on the ground that mouthwash and hardware are articles so dissimilar that the public would not be led to believe that the defendant's hardware is made by the plaintiff mouthwash manufacturer. The German courts would agree with this reasoning and yet would grant relief—quite properly so, I think—on the ground that there is the likelihood of confusion of connection. They reason that in view of the tendency of modern industry to integrate in many puzzling ways, buyers are likely to believe that there exists some connection between the mouthwash manufacturer and the hardware manufacturer, that the former is sponsoring or financing or exercising control over the latter, or in some other way assumes responsibility for the latter's enterprise.

Knowledge of this German doctrine may be very helpful to the practitioner because it carries the American doctrine just one step further. It is not very far from the concept of confusion of source to the concept

10. A comprehensive discussion of this question will be found in my article entitled "Unfair Competition by Truthful Disparagement," 47 Yale Law Journal 1304 (1938).

It is worth mentioning that this rule was first laid down by the French courts under a monarchical form of government, and then taken over by the republican courts. Similarly, in Germany, the Nazi courts adopted and refined principles which the republican courts had been the first to formulate. This strongly suggests that the rule here advocated is not dependent on a particular form of government but can satisfactorily operate in any country as long as some form of competition exists.

11. *L. E. Waterman Co. v. Gordon*, 72 F. (2d) 272.

12. This very case has actually come up in Germany; similar cases are likely to arise here, since the use of another's trade-mark on non-competing goods is today the normal rather than the exceptional case of infringement. See note 13.

of confusion of connection, and I am inclined to think that American courts could be persuaded to adopt this theory.¹³

Design piracy is not regarded as actionable unfair competition in this country.¹⁴ On the contrary, honest efforts made by originators of designs to protect themselves against this ruinous practice have been prohibited by the courts.¹⁵ Lawyers seeking to change the trend of recent decisions might find it useful to refer the judges to the well-considered rules that have been laid down by courts in foreign lands. French and German courts have taken the position that design piracy does constitute unfair competition if it is accompanied by underselling.¹⁶

The suggestions here made are illustrative rather than exhaustive. There is probably no field that lends itself better to the comparative approach than the field of unfair competition. We are dealing with a flexible and growing concept. We have the same concept in foreign countries, and find the same business practices and abuses giving rise to the same problems. Even the most provincial lawyer can hardly deny that in trying to find out what unfair competition is, the experience abroad should be of invaluable aid.

But while the law of unfair competition is an ideal field for the approach here suggested,¹⁷ it is not the only field. As indicated, foreign legal principles have made important contributions to the growth of our constitutional law, and there are great potentialities for further contributions. The most important case to be noted here is probably that of *Muller v. Oregon*.¹⁸ An Oregon statute providing that women should not be employed more than ten hours a day was challenged as violating the Due Process Clause of the Fourteenth Amendment. Mr. Brandeis, who appeared for the state, undertook to show the reasonableness of the Act by pointing out that similar statutes had been enacted in England, France, Switzerland, Austria, Holland, Italy and Germany. The Supreme Court was evidently impressed by this argument, for, in sustaining the validity of the statute, it said:¹⁹

"The legislation and opinions referred to . . . may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure . . . justify special legislation."

The cases of *People v. Schweinler Press*²⁰ and *Bunting*

13. I have fully developed the contribution of the German law to this American problem in "Non-Competing Goods in Trade-Mark Law," 37 Columbia Law Review 582, 588, 602 (1937).

See also Schechter, "The Rational Basis of Trade-Mark Protection," 40 Harvard Law Review 813, 831 (1928).

14. *Cheney Bros. v. Doris Silk Corp.*, 35 F. (2d) 279.

15. *Millinery Creators' Guild v. Federal Trade Commission*, 109 F. (2d) 175, *Fashion Originators' Guild v. FTC*, 114 F. (2d) 80.

16. Reichsgericht I. Z. S. March 19, 1932, Entscheidungen des Reichsgerichts in Zivilsachen Vol. 135, p. 385. Oberlandesgericht Düsseldorf II. Z. S. Nov. 14, 1934, Markenschutz und Wettbewerb 1935, 196. Court de Lyon November 18, 1936, Annales de la Propriété Industrielle 1937, 329.

17. See also Chafee, "Unfair Competition," 53 Harvard Law Review 1289, 1321.

18. 208 U. S. 412.

19. On p. 420.

20. 214 N. Y. 395, 403. I am indebted to my friend and colleague, Walter Gellhorn, of the Columbia Law School, for calling my attention to this case.

v. *Oregon*²¹ present other significant instances where reference to foreign law has helped to persuade our highest courts to sustain the constitutionality of social legislation.

While the United States Supreme Court, in recent years, has sustained the great bulk of social and economic legislation as not being in conflict with the due process clause of the Fourteenth Amendment, a good many of the highest state courts still show a tendency to invalidate such legislation under the due process clause of their respective state constitutions. I believe that the presentation of pertinent foreign materials will be of assistance in convincing the courts of the reasonableness of some statutes that have recently been held unconstitutional. To illustrate: Traders frequently promote the sale of their products by giving premiums. Manufacturers of cereals give toys as premiums, gasoline retailers give water-glasses, etc., and the practice is to distribute the premiums to everyone who buys a certain quantity of the product. This method of sales promotion has been prohibited by many state statutes in the course of the last sixty years. However, a majority of American state courts have held, and continue to hold, that these statutes are arbitrary and capricious and therefore violate the due process clause of the state constitutions. But it so happens that anti-premium statutes have been passed in at least a dozen European countries, that legislative committees, courts and legal writers in Europe have pointed out the objectionable features of this practice. This body of respectable authority should have a substantial bearing on the question whether a prohibition of premiums is so arbitrary and capricious as to be beyond the pale of legislative regulation.²²

A similar situation is presented in regard to state statutes establishing compulsory closing hours for retail stores. A great many of them have, in recent years, been declared unconstitutional by our highest state courts.²³ This trend of decision might well be reversed if it were pointed out why most European countries, including the democratic ones, have found it desirable to provide for compulsory closing hours by statute.

Perhaps a few words should be added as to where and how the foreign material here discussed can be located. The articles cited in footnotes 10, 13 and 22 contain references to the pertinent foreign authorities.²⁴ The entire foreign source material there referred to is available at the Law Library of Columbia University. It is probably also available at the libraries of other universities such as Harvard, Yale, Michigan, Chicago, etc., where comparative law work is being carried on, as well as at the libraries of the larger bar associations. In case a practitioner has no access to the foreign source materials, it might be advisable for him to communicate with a lawyer who does.

21. 243 U. S. 426, 438. Mr. Frankfurter, now Mr. Justice Frankfurter, had called the attention of the court to the pertinent foreign material.

22. I have recently pointed this out in some detail in my article, "Sales Promotion by Premiums as a Competitive Practice," 40 Columbia Law Review 1174, 1191 (1940).

23. The decisions have been collected in my paper on "Picketing by Business Competitors," 87 University of Pennsylvania Law Review 280, 287, note 25 (1939).

24. See also Barton, "A Study in the Law of Trade Secrets," 13 University of Cincinnati Law Review 507 (1939); and my paper entitled "Business Monopolies: Three European Systems in Their Bearing on American Law," 9 Tulane Law Review 325 (1935).

BOOK REVIEWS

A*N Introduction to Administrative Law With Selected Cases*, by James Hart. 1940. New York: F. S. Crofts & Co. Pp. xviii, 621.

Not more than a decade ago a course in administrative law was a curricular luxury which few law schools could afford and some regarded as at least relatively undesirable even if procurable. The casebooks on administrative law were almost all published in the last ten years. But now the course has become established in a large number of law schools and is commonly regarded as a necessity. Indeed, the course promises to condense into less than a score of years a life experience which in other courses required a half century or more. For the desirability of a course in administrative law is again in issue among law teachers. Of course, the issue is not whether students should spend time on administrative law rather than on bills and notes, mortgages, contracts and so on. The issue now is whether administrative law should not be apportioned among a number of other courses, on the basis of the subject matter of administrative action, rather than be taught in a single general course. And it is not at all improbable that much of the market for casebooks on administrative law may soon be captured by casebooks on regulation of securities, of transportation, of competition, of labor relations and the like. But if or when this happens, it may still be desirable to provide students with an elementary introductory course—or a later general course for comparative study and consideration of common problems and ideas.

Professor Hart's book is given the modest title "An Introduction to Administrative Law." In a sense the title is over modest. The book covers more subjects than are generally contained in the law school casebooks or courses on administrative law: the appointment and removal of officers, officers *de facto* and *de jure*, incompatible offices, separation and delegation of powers, the kinds and scope of administrative powers, the procedures of rule making and adjudication, the conclusiveness of administrative determinations and their enforcement, and the various remedies, extraordinary and ordinary, against administrative action. The number of cases reported or abstracted is also no smaller than that in the casebooks not so modestly entitled. Were the book printed with decent regard for its readers' eyes, it would be, in bulk as well as in content, a regular casebook on administrative law. But the truth is that all the casebooks on administrative law are introductory—introductory in the sense that they do not and cannot cover the entire field, that they deal with problems more or less common to most agencies but do not investigate fully the operations of all or even some of the agencies.

Professor Hart's book is introductory in another sense. It is designed not for law students but for "undergraduates" and "graduate students who are not trained in the law"; and its object is to provide for such students of public administration a "training in the legal matrix of their subject" and to bring to the attention of students of political science and undergraduates preparing for law the "implications of administrative law." Accordingly, the book is a combination

casebook and text book. About half of the volume is devoted to the author's comments, analysis and systematization. These are woven in with the cases throughout the book, the cases serving largely as illustrations and statements in the courts' language of the ideas analyzed and classified in the author's text. The cases are drastically edited—the facts usually restated by the author and omissions made which a law teacher might consider unthinkable for a law school casebook. To further aid the non-law student, the author wrote in the Introduction an essay on how to analyze and study reported cases; and in later parts of the book he wrote elementary expositions of some technical legal conceptions, such as *res judicata*. The remedies of quo warranto, mandamus, prohibition and injunction are introduced by excerpts from High's Extraordinary Legal Remedies (1896) without quotation but "very largely in the learned author's own language." The "general features" of habeas corpus are "briefly summarized from *Bouvier's Law Dictionary*."

The method of combining editorial comment with cases is also characteristic of Gellhorn's casebook on Administrative Law published at about the same time as Professor Hart's. But whereas the latter's comments are designed largely to state the legal doctrines and to classify them, the former's are chiefly critical and analytical, directing attention to alternative solutions and posing questions of policy as to the solutions adopted. The slant of Hart's book is to apprise the non-law student of a given and rather fixed legal matrix; the slant of Gellhorn's book is to train the law student in the moulding of a developing legal matrix.

Professor Hart is, of course, more qualified than I to know the needs of undergraduates and non-law students of political science and public administration. But I have some doubts as to the value of this introduction—doubts which he has probably resolved satisfactorily. The focus of the book is a systematization of legal relationships in administration. The materials are arranged on the basis of a classification of legal doctrines and problems. The cases selected are from state and federal courts and deal with a great variety of administrative action, federal, state and municipal. My first doubts are whether the student will get from these materials an appreciation of administrative processes in action, of the essential differences between administrative agencies, of how or why specific agencies were established, how they are organized, what they do in detail and what their specific problems and needs are. The answer probably is that these deficiencies can be supplied partly in other courses and partly by supplemental reading or class room discussion. My other doubts are whether the materials do not tend to present the legal doctrine in too rigid a fashion and whether the detail on the legal level is not so great as to confuse the neophyte. (Why 26 cases on the "tort liability of officers and sureties," especially when only four of them were decided after 1900?) But here, too, probably the instructor may be relied upon to provide the sense of proportion.

HARRY SHULMAN.

Yale School of Law,
New Haven, Conn.

Trade Agreements. A Study in Democratic Methods. By John Day Larkin. New York: Columbia University Press, 1940. Pp. xii, 136. This little book is a product of institutional research. It is a research study of the Division of Economics and History of the Carnegie Endowment for International Peace, directed by James T. Shotwell, the publications of which division are edited by Eugene Staley. The book gets off to a bad start because of the inevitable editorial "foreword," which, here as elsewhere, takes from but does not add to the author's preface.

In Part I, Professor Larkin inquires into the constitutionality of the trade agreement process. In one chapter he disposes of the Trade Agreements Act and its critics; and in another he discusses appropriate checks and balances. A firm believer in the new process, Professor Larkin's first chapter is what one would expect in a subjective account, based on grounds of policy. The constitutional defense, set forth in Chapter II, makes use of the traditional cases and authorities, and comes to an anticipated conclusion, without any novel or striking argument set forth. The author, in assimilating constitutional objectors to the classification of "protectionists," commits a serious error, and indicates a tendency to "get at" all opposition rather than to analyze a case. The discussion of the trade agreements in the light of our reciprocity treaty experience is not as convincing as it might be.

In Part II, the author is on firmer ground in which deals with the democratic character of the trade agreements organization and procedure. A good case is made for the device as being within the ambit of democratic processes, and it does, in truth, as the author says, spring from the legislative power of the entire Congress rather than the more privileged treaty power of the President and Senate. A better and less labored case could have been made by seeking to establish that, even in a democracy, some functions must be committed to executive adjustment which cannot await the details and delays of legislative determination.

In Part III, the trade agreements method is represented to be in every way superior to the congressional method of tariff-making. Even the most pronounced, but fair-minded, protectionist must take notice of the soundness of the author's observations on this point.

One looks in vain for reference to articles and notes on this subject in the American Journal of International Law and cognate legal journals—surely an unintentional omission.

This is a fairly adequate study of one phase of the international economic relations of the United States. The device described seems as inadequate today as was the unilateral tariff law at the time the Trade Agreements Act was passed.

CHARLES E. MARTIN.

University of Washington.

AS the JOURNAL goes to press there come dispatches from Havana indicating the successful meeting there on March 24 to 27 of the Inter-American Bar Association. President Lashly led the large delegation of lawyers from this country. We hope to print something about the meeting in the May issue.

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London Letter

Still More War Damage

THE aerial bombardment of the Inns of Court is becoming such a frequent occurrence that it is difficult, if not impossible, in these letters to keep up to date with the events as they occur. It may be well, for the sake of clarity, to deal with the damage sustained by each of them in turn, and in the chronological order of events.

Middle Temple

The March "London Letter," posted somewhat earlier than usual in case of delay, had just been despatched when more trouble descended upon the Temple in the shape of another [censored]. This one fell in the Middle Temple Garden [censored] about thirty feet from the South end of the Library, making a huge crater in the soft earth. It wrecked many sets of barrister's Chambers overlooking the garden; partially wrecked the Middle Temple Treasury; blew out all the material with which windows had previously been filled, and did very considerable damage to the Middle Temple Library. The whole of the South window of the Library was smashed to pieces, including the stone mullions. Between twenty and thirty interior doors were wrenched from their fittings, some being splintered to matchwood. Bookcases in the main room were emptied of their contents and some were smashed beyond repair. In the store-rooms below most of the book-cases were stripped from the walls and their contents scattered. Large cracks have been made in the building; two small interior walls were demolished, and some sixty thousand tiles were stripped from the roof. The building itself seems to have been blasted somewhat out of plumb, but it still stands—a fact which seems to have caused some surprise. Whether it will continue to stand, and can be repaired, or whether it will be necessary to rebuild, is a matter which will have to be decided by experts.

The appearance of the interior of the building on the morning after the explosion beggars description. Books, splintered glass, soot, masonry, wood and mould from the garden were heaped to a height of about three feet over the whole of the floor space, and it was impossible to enter any of the rooms until a way had been cleared. The task of getting approximately 50,000 books off the floors, brushing out the glass from between the pages, where it had been blown by the force of the explosion, and stacking them so that they would not be too difficult to find when wanted, was not an easy one. But it was made lighter by the help of volunteers who immediately offered their services. The Librarian and Assistant Librarian of Lincoln's Inn gave what time could be spared from their own duties. A Master of the Bench of Lincoln's Inn, complete with boiler suit, added his quota. A Master of the Bench of the Middle Temple, together with a lady barrister and a West Indian student, all joined with the Librarian of the Middle Temple and the two remaining members of his staff in the noble effort of cleaning and stacking the books. Cuts from splintered glass were accepted as part of the day's work.

In the great incendiary raid of the 29th December, 1940, the only damage sustained by the Middle Temple was the loss of two or three sets of Chambers which

were partially destroyed by fire, some of the contents being salved.

Three days later another [censored] exploded on the junction of Harcourt Buildings and Crown Office Row, and still more buildings were razed to the ground. One which had been seriously damaged, but which had remained standing after a previous raid, also collapsed. So great was the force of the blast on this occasion that, in spite of the fact that Plowden Buildings acted as a buttress against it, all the stone mullions of the large window at the North end of the Middle Temple Library were blown in, and some tons of masonry blocked the entrance. In addition, all the material with which the window cavities had been re-filled, was again blown out. A bitter north-east wind did not add to the comfort of working in the Library and, before the gaps could again be filled, the staff had had the unique experience of working in an indoor snowstorm. It is satisfactory to report that, so far as can at present be ascertained, no books have been lost, or damaged beyond repair, though many bear the scars of war on their covers where they have been cut by glass, and hundreds have, as a result of exposure to the elements, acquired a somewhat "second-hand" appearance, and suffered some depreciation. The very fine collection of American Reports, for which this Library is noted, as well as the various series of American Law Reviews, stood up to the shock more successfully than anything else in the building, only two volumes being slightly damaged. Can it be possible that the weightiness of the decisions contained therein form such a solid foundation of justice as to render them immune from disturbance, even by the most powerful weapons of international lawlessness?

At present it is impossible to say when the main room of the Library can be re-opened, but on the 6th January, 1941, a good working Library, which is functioning successfully, and to which members of the Inner Temple are admitted, was opened in the Middle Temple Common Room, on the ground floor of the building. Lunches were resumed in the Parliament Chambers on the 13th January.

[Censored] later two incendiary bombs fell on buildings in the Temple, one of which caused only slight damage to a few articles in a set of chambers, the other being put out immediately.

Inner Temple

It may be remembered that reference has already been made to the damage sustained by the Inner Temple Library and Hall in previous raids. [Censored] the great incendiary raid of the 29th of that month spelled disaster to the Library of that House. Four rooms were completely gutted by fire and much damage was done by water. A very large number of books have, undoubtedly, been lost, and many so seriously damaged that it is doubtful if they can be repaired. At present it is impossible to arrive at an estimate of the value or number of books destroyed.

The Inner Temple, besides having an excellent collection of modern law books, were justly proud of their collections of general literature, early editions of notable English law books, and pamphlets. These collections were of great value and many of the items

contained therein cannot be replaced. The English literature section is very seriously damaged, both by fire and water, while the collection of early law books now has the appearance of being a large charred mass of wet paper, and it is feared that it is almost completely destroyed. The valuable collection of pamphlets is in the same lamentable condition. The fact that the Librarian had already made arrangements to have these volumes taken to a place of safety and, as it were, was "beaten on the post" adds still further to the tragedy of their loss.

As in the Middle Temple, so in the Inner Temple, the Librarian was faced with the problem of removing glass from the books and stacking them in places where it was hoped that no further damage would be done to them. To do this it was necessary to clear a way through the charred wreckage of the rooms which had been gutted by the fire and were roofless. The picture of desolation presented by these rooms can be more easily imagined than described. Great charred beams, burnt books, broken furniture and bookcases, all had to be cleared out before a start could be made on salvage work. When the writer was privileged to walk through these rooms the whole dismal scene was covered with snow.

Steps have been taken to dry as many volumes as possible, and one of the Benchers' rooms on the ground floor has been converted into a drying room. Stacks and shelves, capable of holding some hundreds of volumes at a time have been fitted up, and two large fires are kept constantly burning, but it is a slow process and much time must elapse before the Library will be open for use by Members of the Inn again. One bright spot may be recorded—it is still possible for Inner Templars to have a good lunch in the Niblett Hall.

Other Damage in the Temple

At the same time as the Inner Temple Library was set alight a fire was also caused in King's Bench Walk, which did a good deal of damage to chambers before it was put out. [Censored] a large calibre high explosive bomb wrecked a building in Mitre Court, demolished about a third of the house occupied by the Master of the Temple, and caused very considerable damage to rooms in the Inner Temple which were being used by a section of the Auxiliary Fire Service as their headquarters in the Temple. Fortunately all members of the section had been called out on duty shortly before the bomb fell. They were comfortably installed in new quarters on the following day. The Temple Church lost most of its glass on this occasion, but it seems that no serious damage has been done to the structure. Although much of Crown Office Row is down, number 2, the house in which Charles Lamb was born is standing, and on the plaque marking the place can still be read the quotation "A man would give something to have been born in such places." This was undoubtedly true when it was first written, but it is not a particularly healthy spot in which to live at the present time.

Gray's Inn

Of the four Inns of Court, Gray's Inn had [censored] been the most fortunate. Several bombs had dropped in the garden and some damage had been done to many sets of chambers as a result, also numerous windows in the Inn had been broken. But one day [censored] two high explosive bombs practically demolished two buildings at the South-east corner of South

Square, and it seems likely that a third building will have to be pulled down. The Hall and Library, which are on the opposite side of the square, did not suffer so greatly as might have been expected. All the windows of both were shattered, and the tiles lifted from the roof of the Hall. Fortunately the stained glass and pictures had already been moved to a place of safety. In the Library many books were thrown on to the floor, but suffered little damage, and none was lost. The very handsome ceiling in the middle room was badly broken and, although it has been propped up temporarily with timbers, it is feared that it may have to come down. The Library was closed for some days for the necessary cleaning and re-arrangement of the books, during which time members of that Inn were accommodated in the Libraries of Lincoln's Inn and the Middle Temple. The bronze statue of Francis Bacon, in South Square, which was unveiled by Mr. Balfour on June 27th, 1912, was blown from its pedestal, but seems to be none the worse for it. There were no casualties.

Lincoln's Inn

In the March "London Letter" it was noted that Lincoln's Inn sustained some damage to their Hall and Library by blast, and it is gratifying to state that no further damage has been done to those buildings since then. But this does not mean that Lincoln's Inn has escaped all further trouble. Several sets of chambers in Old Square have been badly damaged by fire, and a house in Stone Buildings was partly destroyed by a high explosive bomb. In this case the explosion took out the ground floor, and occupants of the floors above were rescued by means of ladders. It is interesting to note that the rebuilding of this house is well on the way to completion. Yet again one is happy to report that there were no casualties. It seems that barristers are not easily killed. It would be impolite to make the obvious comment.

Calls to the Bar

The calls to the Bar at the Inns of Court during Hilary Term numbered forty-three—one better than in the previous term. Again the Middle Temple headed the list with 17; Gray's Inn came second with 10; Lincoln's Inn took third place with 9, and the Inner Temple had the remaining 7. These figures are, of course, much lower than in normal times, but they are a happy indication of the fact that, in spite of all difficulties, the Bar and the Inns of Court are carrying on with their work like the rest of the country. It is a sign of the times that one of those called to the Bar described himself as an "ordinary seaman."

The sentiments expressed by H. E. Duke, K. C. (later 1st Baron Merrivale) in a lecture which he delivered in the Middle Temple Hall on the 17th June, 1912, may be quoted as reflecting—perhaps even more aptly at the present time—our general outlook. He said: "The Inns of Court go marching on. They go marching on with the memories behind them of a great history and of a fellowship of great men in a common pursuit which illustrates the legal life of this country. Can we doubt of the Inns of Court that, while those who govern them and those who constitute them regard them as places whence men go forth to service, there will be for them a future as great as their past?"

Temple.

S.

WASHINGTON LETTER

Americans All

After the Lend-Lease Bill, H. R. 1776, had become law, some of the Senators who had strenuously opposed it came forward with statements showing the real spirit of unity which prevails in the United States for helping Britain and the other nations fighting for freedom against tyranny. Seldom has there been a quicker burial of differences of opinion, as to *methods* to be pursued by a large part of Congress, in the interest of the larger issue of the job to be done. For example, Senator Alexander Wiley, of Wisconsin, speaking in behalf of our revived spirit of '76, said in part:

"Like other Senators, I favored assistance to England, but I recognized certain grave dangers in the measure, and because of those dangers I opposed the bill. I wish to state today that, while I still feel that these dangers exist, and may result in war, I refuse to be one of those who regard war as inevitable when the bill becomes law. As one member of the minority who opposed this legislation, I want to say I believe that if this bill is sanely administered, and if the totalitarian powers do not force us into this conflict, we may still be able to remain at peace."

Senator Arthur Vandenberg, of Michigan, who also had opposed the Lend-Lease Bill and the form in which it planned to accomplish its major purpose, commended Senator Wiley on his address in behalf of "national unity," and called attention to a fact which, he said, "seems to have escaped public attention, and which is significant and eloquent in its bearing on this subject." He continued:

"The outcome of the contest over H. R. 1776 has been heralded across the Nation and throughout the world as indicating a division in the ratio of 60 to 31 in the Senate on the question of aid to Britain. I call attention to the very significant fact that on the two final roll calls upon the bill—the roll call on the bill itself and the roll call on the Taft substitute which also proposed large and specific aid to Britain—90 out of 95 directly registered themselves in favor of aid to Britain."

New Duties for Retired Judges

Heretofore, there has been no provision for calling back to temporary duties judges of United States courts who retire because of "disability," under the Act of August 5, 1939 (Title 28 U. S. C. A., Secs. 375b to 375e) as dis-

tinguished from those retiring because of length of service and age (Title 28 U. S. C. A., Sec. 375, being Sec. 260 of Judicial Code as amended March 1, 1929). Senator Van Nuys, of Indiana, Chairman of the Judiciary Committee of the Senate, has introduced a bill, S. 1050, which would amend the Act of August 5, 1939, so that judges, who retire upon becoming permanently disabled and unable to perform the full duties of the office, might be called upon to perform such judicial duties as they may be willing to undertake. A justice or judge who had retired under that act, might perform judicial duties only when called upon and authorized by the Chief Justice of the Supreme Court, in the case of that Court; by the senior Circuit Judge, in the case of a Circuit Judge; or by the presiding or senior Judge, in the case of a Judge of a District Court.

Another bill, introduced by Senator Van Nuys, S. 1053, if enacted into law would amend Sec. 117 of the Judicial Code (Title 28 U. S. C. A., Sec. 212), so that, in a Circuit Court of Appeals having more than three Circuit Judges, a majority of such judges could provide a court of all of the active and available Circuit Judges of the Circuit, to sit *en banc* for hearing particular cases whenever, in their opinion, this action is desirable.

What Is the "Western Hemisphere"

We do not know where the "Western Hemisphere" is nor what is its extent; but we do know that recently it has gotten decidedly out of line with the literal accuracy of the idea (pointed out in the July, 1940, issue of the JOURNAL) that the Monroe Doctrine had been made statutory. It all happened this wise.

In the last Congress, the Senate passed S. J. Res. 271 on June 17, 1940. The House, the next day, passed H. J. Res. 556 which generally was thought to be identical with the Senate's resolution. They were listed in the House Calendar in the same manner that identical bills and resolutions always are listed. Therefore it was widely heralded that the Monroe Doctrine had become statutory. There is no doubt of the uniform intention to enact such a proposition into law. But in the rush to do so, everybody lost sight of a slight detail. The House resolution used the words, "this Hemisphere," whereas the Senate resolution used the words, "Western Hemisphere."

Later, this variation was discovered; and now we have, in the present Con-

gress, S. J. Res. 7, which passed the Senate March 10th and is expected to be taken up by the House on April 7th, no doubt for speedy passage. The phraseology used in the latest joint resolution is: "this Hemisphere." According to Webster, the word hemisphere, used in this sense, means "half of the terrestrial globe." It is therefore a little difficult, and somewhat confusing, to say that either hemisphere is any more "western" than the other. In any event the bungle in drafting requires correction.

Now that we have been eight months without this statute, which everybody thought had been duly enacted, one may properly ask, both from the point of view of Law and Scholarship: Just what is the effect, anyway, of making the "Doctrine" statutory? Does the "moral effect" of recording that way make it any more the will of the people? That seems to be the central idea behind this legislation.

National Defense Mediation Board

If the most important thing in a national production plan for war materials is industrial peace, then creation of the new eleven-man Mediation Board is Washington's news-event of the past month. No one will doubt that a labor-employer "peace," based on a feeling of justice by all parties, will result in more and better output, than a "peace" enforced against either partner in industry.

A fair trial of the non-compulsory settlement idea is assured by the high character of the Board members. They have been chosen for the thankless job of giving a quick solution of major labor controversies. At the same time the creation of the Board (by an executive order) was announced, its membership was revealed. It consists of:

It is generally felt that this Board will succeed in its task. If, however, mediation through this new Board should fail to keep production lines in operation, the iron hand of compulsion may break through this velvet glove of mediation. The Board's decisions would then be made mandatory, through additional legislation if necessary, instead of being, as now, merely advisory. The Board is now acting under the general powers of the Office of Production Management, and no new legislation has been sought for it. The method of operation is to have a particular dispute worked out by a subcommittee of three designated by the Chairman, such subcommittee having representation from each of the three major groups composing the Board.

BAR ASSOCIATION NEWS



HENRY C HART
President, Rhode Island Bar
Association

Rhode Island Bar Meeting

THE Rhode Island Bar Association held its annual meeting December 2, 1940, in Providence. Officers elected for the ensuing year are as follows: President, Henry C. Hart; First Vice President, Henry M. Boss; Second Vice President, Fred B. Perkins; Secretary, Lee A. Worrell; Treasurer, Andrew P. Quinn, all of whom are of Providence. The business of the meeting consisted chiefly of the rendering of annual reports of all of the standing and special committees of the Association. The Constitution was amended to permit the Executive Committee to propose to the American Bar Association the establishment of a system of joint dues by the two Associations by which those members of the State Association under the age of thirty-six years could become members at the same time of the American Bar Association. Such a proposition has since been approved by the Executive Committee and forwarded to the Board of Governors of the American Bar Association.

The proposed new rules of Civil Procedure for the Superior Court were the subject of considerable discussion and it was announced that hearings before the full Court would be held by the Court prior to any action thereon by it.

New York State Bar Association

THE sixty-fourth annual meeting of the New York State Bar Association was held January 23, 24, and 25 in New York City. As usual, it brought out a large gathering of jurists and lawyers for an interchange of ideas. Warnick J. Kernan of Utica, president, presided at many of the sessions. He was succeeded as president for the coming year by John G. Jackson of New York City. Other officers elected include: R. E. Lee, New York City; Christopher W. Wilson, Brooklyn; Ellis J. Staley, Albany; James McPhillips, Glens Falls; Lewis C. Ryan, Syracuse; Owen C. Becker, Oneonta; Edward J. Cook, Geneva; Morey C. Bartholomew, Buffalo; and John E. Mack, Poughkeepsie, who were elected vice presidents. Charles W. Walton, Kingston, was re-elected secretary and Robert C. Poskanzer, Albany, was elected treasurer.

Major Samuel E. Aronowitz of Albany, discussed "The Bar and Selective Service" at the Friday afternoon session and pointed out that members of the Bar have an "opportunity and a duty." "In my opinion," he said, "any young attorney leaving for service should feel free to call upon the older members of the Bar to take care of his work for him."

Chief Judge Irving Lehman of the Court of Appeals, made the annual address at the banquet at the Waldorf-Astoria Hotel. He spoke on "The Supremacy of the Law," and was given a notable ovation.

Roscoe Pound, dean emeritus of Harvard Law School, made an address on Saturday on "The Place of the Judiciary in a Democratic Polity." [His address is published at pages 133 to 139 of the February JOURNAL.] Dean Paul Shipman Andrews of the College of Law, Syracuse University, also spoke, his subject being: "A More Perfect Union."

The concluding feature of the annual meeting was the dinner at the Waldorf-Astoria on Saturday evening. It was well attended by lawyers from all sections of the state. President Warnick J. Kernan was toastmaster. The speakers included United States Senator Robert A. Taft; Justice Charles B. Sears, who retired recently from the Court of Appeals; Associate Judge John T. Loughran of the court; and Hon. Claud N. Sapp of South Carolina.



Dorothy Wilding

JOHN G. JACKSON
President, New York State Bar
Association

Federal Bar Association

THE Federal Bar Association held its twenty-first annual dinner at the Mayflower Hotel, Washington, D. C., on February twenty-eighth. President Heber H. Rice presided. The distinguished guests included, among others, the guest of honor, Mrs. Franklin D. Roosevelt; Associate Justice Stanley F. Reed of the United States Supreme Court; Senators Carter Glass of Virginia, William J. Bulow of South Dakota and Harley M. Kilgore of West Virginia; Congressman Robert Ramspeck of Georgia; Chief Justice D. Lawrence Groner of the U. S. Court of Appeals for the District of Columbia; and Major General Allen W. Gullion, Judge Advocate General of the Army.

Hon. Robert P. Patterson, Under Secretary of War, delivered an able address upon "The Lawyer in National Defense," followed by Hon. Francis Biddle, Solicitor General of the United States, whose impressive address was upon the subject, "The Government and the Public."

Six hundred guests were present, including delegations from New York and from other branch chapters.

DAVID S. DAVISON,
Secretary.



Kalden-Keystone

GLENN C. GILLESPIE
President, Michigan State Bar



Parker-Griffith

ROY C. LEDBETTER
President, Bar Association of Dallas

Maine State Bar Association

THE regular biennial session of the Maine State Bar Association was held in Augusta on January 8, 1941. This meeting marked the fiftieth year in the history of the organization. One hundred and twenty-six new members were added to the membership list, bringing the total membership up to five hundred and thirteen.

The first session was devoted to routine business, the reading and acceptance of reports by the secretary and treasurer, appointment of committees and the introduction and acceptance of resolutions.

At the second session, an address was delivered by Dr. Edwin M. Borchard, professor of law at the Yale Law School, on the subject, "Declaratory Judgments."

Officers elected for the ensuing two years were Louis C. Stearns of Bangor, president; Walter L. Gray, of South Paris, Charles E. Gurney of Portland, and James B. Perkins of Boothbay Harbor, vice president; and Ralph W. Leighton of Augusta, secretary and treasurer.

RALPH W. LEIGHTON,
Secretary and Treasurer.

Bar Association of Arkansas

THE Bar Association of Arkansas, at its May, 1940 meeting, passed a resolution directing the incoming administration to carry out the plan, in this State, of conducting Legal Institutes for local lawyers. This committee has functioned admirably and through

its efforts eight different Institutes have already been held throughout the State. Among the subjects so far discussed are the following:

Proposed Statutory Changes in
Probate Law
Tax Titles
The Workmen's Compensation
Law
Rules and Decisions of Federal
Procedure
Preparation and Trial of a Law
Suit from the Standpoint of a
Trial Judge
Preparation and Trial of an
Equity Suit from the Stand-
point of a Chancellor.

Other Institutes are now being prepared and it is believed that each chancery district in the State will hold one or more of these programs during the current year.

TERRELL MARSHALL,
Executive Secretary.

Law Society of Massachusetts

THE quarterly Journal of the Law Society of Massachusetts for February, 1941, shows the variety of activities of that well-known Society. Its officers are: Arthur L. Eno of the Lowell Bar, President; Frank C. Gorham, Treasurer; Joseph Schneider, Corresponding Secretary. Original articles in the Law Society Journal include: "Recent Federal Legislation Affecting Defense Contracts," and "Free Speech" Under the National Labor Relations Act."

Judge Gillespie was chosen President of the Michigan State Bar at the 1940 annual meeting, an account of which appeared in the December issue of the Journal.

Mr. Ledbetter was elected president of the Dallas Bar at the meeting of that Association in January.

New Jersey State Bar Association

THE JOURNAL is just in receipt of the "Year Book" of the New Jersey State Bar Association for 1940, a bound volume of 350 pages. Sylvester C. Smith, Jr., of Newark, a member of the Board of Governors and of the Budget Committee of the American Bar Association, is President of the New Jersey Association; Milton M. Unger, of Newark, William J. Connor, of Trenton, and Augustus C. Studer, Jr., of Newark, are Vice-Presidents; Joseph J. Summerill, of Camden, is Treasurer; and Emma E. Dillon, of Trenton, is Secretary. The volume contains the proceedings of the association throughout the year. It indicates an active and vigorous organized bar in New Jersey. The activities of the various committees of the association are summarized and show active cooperation and support of a wide variety of topics and interests. A substantial part of the volume is given over to Addresses before the annual meeting. These include: "Fifth Column and Civil Liberties," by Hon. Lewis B. Schwellenbach, Senator from the State of Washington; "Administrative Procedures," by Hon. George A. Smathers of the Miami, Florida, Bar; "Is the Administrative Process a Fifth Column?", by Samuel Kaufman of the Newark Bar.

The 42nd annual dinner of the association was held in Atlantic City, June 1, 1940. It was well attended. One of the features of the meeting was the presentation to John R. Hardin, Sr., of Newark, of "The Award of Honor for Service Rendered to the Association." Mr. Hardin has been a member of the New Jersey Bar for fifty-six years, having been admitted in 1884. The meeting ended with a banquet at which Senator Schwellenbach was the principal speaker, his topic being that already indicated.

OPINION OF PROFESSIONAL ETHICS COMMITTEE

OPINION No. 209

(Filed November 23, 1940)

Attorney's Lien—Enforcement of an attorney's lien ordinarily presents a question of law and not one of legal ethics.

Substitution of Attorney—A lawyer may accept employment in a case wherein another lawyer appeared of record and his employment has been terminated by the client; the right to substitution as counsel of record depends upon the practice of the particular jurisdiction and ordinarily presents a question of law and not one of legal ethics.

An inquiry is made concerning the following situation. A client delivers to his attorney records and papers prepared by the client for use in preparing the case; the attorney fails to prepare or prosecute the case, and the client employs another attorney; the first attorney refuses to return the file unless further compensation is paid; the client contends that the attorney has already been overpaid for the services actually rendered by him, and that he has been damaged by the attorney's neglect. In such a situation, the following questions are asked: (1) May the attorney hold the records and papers delivered to him by the client? and (2) May the attorney originally employed prevent the client from engaging another attorney by refusing to permit substitution, or is he limited to suing for his fee?

The opinion of the committee was stated by MR. MILLER, Messrs. Phillips, Houghton, Drinker, Brand, and Jackson concurring. Mr. Brown was absent and did not participate.

(1) In most jurisdictions an attorney is given a lien upon papers of his client properly in his possession as security for the payment of his fee. The question presents a disputed issue of fact as to whether there is a balance due the attorney first employed for which he may assert an attorney's lien. Any controversy arising with respect to the assertion of such lien is ruled by the statement of this committee in Opinion 63, as follows:

"Any question as to the amount of an attorney's fee or method of its payment is a matter of contract, expressed or implied, to be construed as other contracts are construed. Any controversy concerning such a matter is a matter of law to be determined by the courts. Ordinarily no ethical question is involved in such a controversy."

An exception is recognized in cases of flagrant over-charges. See Opinions 27 and 190. From the facts stated, we cannot say that the instant case falls within the exception. We conclude, therefore, that the question is one of law and without the jurisdiction of this committee.

(2) From the facts stated we assume that the client has discharged the first attorney and given notice of the discharge. Such being the case, the second attorney may properly accept employment. Canon 7; Opinions 10, 130, 149. The right to substitution as counsel of record in the case depends upon the practice of the particular jurisdiction. This is illustrated by the following statement in 5 Am. Jur. 284:

"One has, subject to exception in a case where the attorney has an interest in the subject-matter of the suit the right to change his attorney of record at any stage of the cause, and substitute another, provided he secures the consent of the court, which must be obtained by a proper proceeding for the purpose, as by motion, and provided further that he pays the attorney or secures to him the fees he has already earned and to which he is rightfully entitled. If it is impossible in a given case to comply with this rule as to payment or security, the fact must be shown by the party moving the discharge and substitution, and it should appear that justice to the client or attorney demands the change."

Aside from the question as to the right of the second attorney to accept employment, the other matters presented are questions of practice, do not involve legal ethics, and are not within the jurisdiction of this committee.

Origin of ABA Code of Ethics

St. Paul, Minnesota,
March 14, 1941.

American Bar Association Journal,
Chicago, Illinois.

In my last trip through the South I learned, first hand, something about Legal Ethics that will be of interest to all members of the American Bar Association. The late Judge Thomas G. Jones of Montgomery, Alabama, was the author of the first Code of Ethics adopted by any American Bar Association. His Code was adopted by the

Alabama Bar Association in 1887. Afterward a number of State Bar Associations adopted it, and it was finally adopted by the American Bar Association in 1907. The Legislature ordered Judge Jones' Code to be published in 118 Alabama and you will find it there.

Judge Jones had a most distinguished career. He was a Major on Lee's staff during the war between the States and he carried the flag of truce at Appomattox. Afterward, he engaged in the practice of law, was Governor of Alabama from 1890 to 1894 and a Federal Judge in Alabama from 1901 until his death in 1914. His son, Judge Walter B. Jones, also of Montgomery, has been a Circuit Judge for twenty years. He is following the distinguished career of his father as a leader of the bar.

I think you will be interested in tracing the development of the present Canons of Ethics. It was by the sheerest chance that I stumbled on its authentic origin.

Sincerely yours,

JAMES C. CAHILL,
Assistant Managing Editor,
West Publishing Co.

Administrative Law Symposium—Reprints

THE JOURNAL has made a joint reprint of the articles and items on Administrative Law in the March issue and in the April issue. This joint reprint will run to about 35 pages. It includes

[March]

1. Dean Pound's Article, "The Place of the Judiciary in a Democratic Polity."

2. An Analysis of the Bills Accompanying the Attorney General's Report.

3. Summary of the main Attorney General's Committee Report.

4. Summary of "Minority" Report.

5. Additional Views of Chief Justice Groner.

6. Article on "Administrative Procedure Reform," by Chairman Maguire of the Committee on Administrative Law.

7. Editorial Comment.

[April]

8. Discussion on Administrative Law before the House of Delegates of the Association, at the March meeting in Chicago.

9. Editorial Comment.

These reprints will be furnished at cost, and either singly or in bulk. Single copies 25c; 10 copies or more, 15c. Inquiries solicited.

Annual Meeting-Indianapolis, September 29 to October 4

THE Sixty-fourth annual meeting of the American Bar Association will be held at Indianapolis, September 29 to October 4, 1941. Further information about the meeting will be given in the JOURNAL from time to time. The usual Advance Program will be sent out to members.

Hotel Accommodations

Official Headquarters—Claypool and Lincoln Hotels

Hotel accommodations, all with private bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin- beds for 2 persons	Two-room suites (Parlor and 1 bedroom)
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(750 N. Meridian)				
Claypool	3.50-4.00	4.50-5.50		
(Wash. & Ill. Sts.)				
(Advance reservations have already exhausted twin-bed rooms and suites.)				
Columbia Club....	3.00-4.50	6.00-6.50	5.00-7.00	
(Monument Circle)				
Harrison	3.00-3.50	4.50-6.00	6.00	
(Capitol & Market)				
Indianapolis Athletic Club	2.75-4.00		6.00	
(350 N. Meridian St.)				
Lincoln	3.00-4.00	4.50-6.00		
(Wash. & Ill.)				
Marott (Apt. Hotel)	3.00	6.00	6.00	7.00-9.00
(2625 N. Meridian)				
Severin	2.50-4.00	4.00-5.00	5.00-7.00	10½-12½
(201 S. Illinois)				
Spink Arms	3.00	5.00	6.00	7.00
(410 N. Meridian)				
Warren	3.00-4.00	4.50-6.00	5.00-7.00	
(123 S. Illinois)				
Washington	3.00-4.50	4.50-6.00	5.50-6.00	6.00
(34 E. Washington)				

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by *two persons*. A twin-bed room will not be assigned for occupancy by *one person*.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice** of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

Notice By the Board of Elections

The following states will elect a State Delegate for a three-year term in 1941: Alabama; California; Florida; Hawaii; Kansas; Kentucky; Massachusetts; Missouri; New Mexico; North Carolina; North Dakota; Pennsylvania; Tennessee; Vermont; Virginia; Wisconsin; Territorial Group (Alaska, Canal Zone, Philippine Islands).

The following state will elect a State Delegate to fill a vacancy for the term to expire at the adjournment of the 1942 Annual Meeting: Illinois.

The following states, in addition to electing a State Delegate for a three-year term, will also elect a State Delegate to fill a vacancy expiring with the adjournment of the 1941 Annual Meeting: Massachusetts; New Mexico; North Dakota; Tennessee; Vermont; Territorial Group.

Nominating petitions for all State Delegates to be elected in 1941 must be filed with the Board of Elections not later than May 1, 1941. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies, may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. Nominating petitions, in order to be timely, must actually be received at the headquarters of the Association before the close of business at 5:00 P. M. on May 1, 1941.

State Delegates elected to fill vacancies take office immediately upon the certification of their election. State Delegates elected for a three-year term take office at the adjournment of the 1941 Annual Meeting of the Association, which will be held the week of September 29th.

Attention is called to Section 5, Article V, of the Constitution, which provides:

Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group).

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing.

Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition. While there is no restriction on the maximum number of names which may be signed to a nominating petition, in the interest of conserving space in the Journal the Board of Elections suggests that not more than fifty names be secured.

In view of the fact that the time for filing petitions expires on May 1, which normally would be the date on which the May issue of the Journal would be mailed, it is recommended that as far as possible nominating petitions be mailed in time to be received at the headquarters' office on or before April 15, 1941.

Ballots will be mailed to the members in good standing accredited to the States, in which elections are to be held, within thirty days after the time for filing nominating petitions expires.

EDWARD T. FAIRCHILD, Chairman.

NOMINATING PETITIONS

In the interest of conserving space in the JOURNAL, the names of only fifty signers to any nominating petition are being published by suggestion of the Board of Elections.

Alabama

To the Board of Elections:

THE undersigned hereby nominate William Logan Martin of Birmingham for the office of State Delegate for and from the State of Alabama:

Messrs. Hugh D. Merrill, J. B. Holman, Jr., and R. E. Jones, of Anniston;

Messrs. Andrew J. Thomas, Atwell J. Brown, L. D. Gardner, Jr., Gerry Cabaniss, J. T. Stokely, Mortimer M. Baldwin, Lloyd G. Bowers, Richard Hail Brown, Frank K. Exum, Irvine C. Porter, William Alfred Rose, Bryant A. Whitmire, and Paul Johnston of Birmingham;

Messrs. J. R. Ramsey and Oscar L. Tompkins of Dothan;

Messrs. James B. Allen, Wm. B. Dorch, O. R. Hood, and H. S. Patterson, Jr., of Gadsden;

Messrs. Chas. E. Shaver, Milton H. Lanier, James L. Caldwell and Thomas J. Taylor of Huntsville;

Messrs. Vincent Fonde Kilborn, Joseph H. Lyons, Daniel T. McCall, Jr., Chas. C. Hand, C. A. L. Johnstone, Jr., T. K. Jackson, Jr., T. E. Twitty, Gessner T. McCorvey, Francis H. Inge, Leo M. Brown, D. R. Coley, Jr., Wm. H. Ambrecht, Harry H. Smith, T. M. Stevens, and C. M. A. Rogers, of Mobile;

Messrs. Fred S. Ball, B. P. Crum, Sam Rice Baker, Davis F. Stakely, Lee H. Weil, Henry C. Meader, Edwin I. Hatch, J. Mac Jones, and Walter Kennedy of Montgomery.

Florida

To the Board of Elections:

The undersigned hereby nominate Raymer F. Maguire of Orlando for the office of State Delegate for and from the State of Florida:

Messrs. E. A. Clayton and J. C. Adkins of Gainesville;

Messrs. Harry T. Gray, Philip S. May, J. Henson Markham, Frank Dean Boggs, E. S. Hemphill, Clarence G. Ashby, Giles J. Patterson, H. P. Osborne, Edward McCarthy, Jr., Wm. H. Rogers, Louis Kurz, Richard P. Marks, Olin E. Watts, Chester Bedell, Scott M. Loftin, George Cooper Gibbs, and E. J. L'Engle, of Jacksonville;

Messrs. Thomas McE. Johnston, W. G. Troxler, J. G. McKay, Will M. Preston, Robert H. Anderson, M. Lewis Hall, Paul R. Scott, James E. Calkins, Paul C. Taylor, Bryan Hanks, and Richard H. Hunt, of Miami;

Messrs. Hugh Akerman, C. P. Dickinson, Giles F. Lewis, George B. Carter, W. L. Tilden, and W. J. Steed of Orlando;

Messrs. W. H. Watson, Philip D. Beall, E. Dixie Beggs, and J. E. D. Yonge, of Pensacola;

Messrs. Sam H. Mann, Frank M. Harris, Allen C. Grazier and Ed. W. Harris, of St. Petersburg;

Messrs. W. P. Allen and Thomas J. Ellis of Tallahassee; and

Messrs. Geo. W. Coleman, J. Field Wardlaw, Walter W. Foskett and Harry A. Johnston, of West Palm Beach.

Kansas

To the Board of Elections:

The undersigned hereby nominate W. E. Stanley of Wichita for the office of State Delegate for and from the State of Kansas:

Messrs. Dallas W. Knapp, A. R. Lamb, and Chas. D. Welch, of Coffeyville;

Mr. William M. Mills of Emporia;

Messrs. D. C. Martindell, W. D. P. Carey, H. R. Branine, Wesley E. Brown, J. S. Simmons, Roy C. Davis, and Warren H. White of Hutchinson;

Messrs. Chester Stevens, Jay W. Scovel, and Kirke C. Veeder of Independence;

Mr. I. M. Platt of Junction City;

Messrs. Thos. M. Van Cleave, Edwin S. McAnany, J. Willard Haynes, Edw. M. Boddington, J. O. Emerson, Joseph Cohen, Bernhard W. Alden, Louis R. Gates, Arthur J. Stanley, Fred Robertson, and James L. Hogin of Kansas City;

Messrs. Louis E. Clevenger, B. I. Litowich, and LaRue Royce, of Salina;

Messrs. Robert M. Clark, C. Glenn Morris, Walter G. Thiele, Hugo T. Wedell, Franklin Corrick, Barton E. Griffith, Bruce Hurd, Robert Stone, Ralph Oman, Philip H. Lewis, John P. Davis, Randal C. Harvey, John H. Hunt, Robert E. Russell, E. H. Hatcher, and Miss Margaret McGurnaghan, of Topeka; and

Messrs. Claude I. Depew, William C. Hook, W. F. Lilleston, Lawrence Weigand and George C. Spradling, of Wichita.

Missouri

To the Board of Elections:

THE undersigned hereby nominate Kenneth Teasdale of St. Louis for the office of State Delegate for and from the State of Missouri:

Mr. James M. Douglas of Jefferson City;

Messrs. Paul G. Koontz, Depuy G. Warrick, Elliot Norquist, W. E. Kemp, Paul Barnett, and William S. Hogsett of Kansas City;

Mr. W. Wallace Fry of Mexico;

Messrs. Fred L. English, Frank P. Aschemeyer, David J. Stephens, Thomas F. McDonald, George S. Roudebush, Richmond C. Coburn, Jesse W. Barrett, Luther Ely Smith, James E. Garstang, Israel Treiman, Richard S. Jones, Fred L. Williams, Vaughn C. Ball, Kern L. Cochrum, R. F. O'Bryen, Robt. J. Keefe, William L. Igoe, J. Porter Henry, Robert D. Evans, Oliver T. Remmers, John E. Curby, and James V. Dunbar, of St. Louis; and

Mr. Frank C. Mann of Springfield.

Pennsylvania

To the Board of Elections:

THE undersigned hereby nominate Bernard J. Myers of Lancaster for the office of State Delegate for and from the State of Pennsylvania:

Messrs. Charles L. Miller, Jacques H. Geisenberger, B. M. Zimmerman, H. Clay Burkholder, Daniel B. Strickler, Louis S. May, John L. Hamaker, A. E. McCollough, Jr., J. Andrew Frantz, G. T. Hambright, T. L. Brubaker, Harris C. Arnold, W. G. Johnstone, Jr., Paul A. Mueller, F. Lyman Windolph, Clay M. Ryan, M. M. Harnish, Chas. G. Baker, and Adolph C. Koehler, of Lancaster;

Messrs. Joseph P. Gaffney, Wm. Clarke Mason, Robert T. McCracken, Thomas B. K. Ringe, Arthur Littleton, M. B. Saul, David F. Maxwell, J. Warren Brock, Franklin S. Edmonds, George P. Orr, George P. Williams, Jr., J. Harry La Brum, George E. Beechwood, Charles H. Howson, Robert C. Walker, and Benjamin O. Frick of Philadelphia;

Messrs. Gifford K. Wright, Ralph D. McKee, Alexander J. Barron, George M. Swan, James Milholland, James K. Ruby, Frank B. Ingersoll, William Booth, William Watson Smith, Leon E. Hickman, Edgar D. Bell, Allen T. C. Gordon, David B. Buerger, Albert P. Weitzel and Donald L. McCaskey, of Pittsburgh.

Not Contempt To Throw Inkwell

A Wisconsin judge, speaking at a local Bar Association meeting, called attention to the carelessness of certain lawyers in looking after the making of the record—how they kept on talking after handing exhibits to the shorthand reporter to be marked, and at times seemingly endeavored to drown out both the witness and opposing counsel. The judge wondered why the reporter did not throw an inkwell at such offending lawyers, and said if such overt act occurred in his court it would not be contempt. Experienced lawyers know that the more assistance they give the reporter, the better the record he can make. After all, the reporter is human, and he can only record what he hears and understands.



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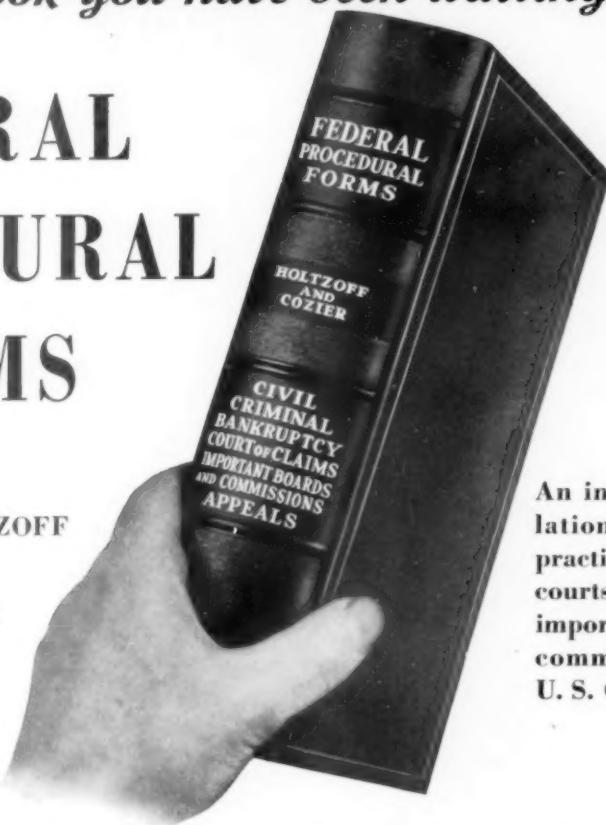
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